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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S. p. A.,
PETITIONER,

vs.

JOHN LISI, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CERTIORARI GRANTED NOVEMBER 6, 1967

PETITION FOR CERTIORARI FILED MARCH 20, 1967

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Summary of Proceedings in District Court from Docket Entries

Since this is an Interlocutory Appeal, only those docket entries in the District Court which are material to the Appeal are set forth below.

—B—

Date	Proceedings
November 7, 1960	— Filed Complaint and issued Summons in Lisi action.
December 22, 1960	— Filed Answer of defendant Alitalia-Linee Aeree Italiane, S.p.A. in Lisi action.

—F—

September 29, 1961	— Filed Complaint and issued Summons in Maiorano action.
October 26, 1961	— Filed Answer to Complaint by defendant Alitalia-Linee Aeree Italiane, S.p.A. in Maiorano action.

—H—

June 12, 1963	— Filed record of proceedings transferred from District Court for the Eastern District of New York and photostatic copy of its Docket Sheet in Como, DiBiase and Cologgi actions.
October 14, 1965	— Filed plaintiffs' Affidavit of Notice of Motion for Summary Judgment.
October 14, 1965	— Filed plaintiffs' brief.
February 23, 1966	— Filed defendant's Statement under General Rule 9(g).

Summary of Proceedings in District Court from Docket Entries

[2a]*

Date	Proceedings
	—H—**
April 1, 1966	— Filed Affidavit of George N. Tompkins, Jr. in opposition to plaintiffs' motion for summary judgment.
April 1, 1966	— Filed defendant's memorandum in opposition to plaintiffs' motion for summary judgment.
April 1, 1966	— Filed defendant's supplemental memorandum of law.
April 1, 1966	— Filed defendant's memorandum of law.
April 1, 1966	— Filed Affidavit of Theodore E. Wolcott in support of plaintiffs' motion for summary judgment.
April 1, 1966	— Filed plaintiffs' reply memorandum.
April 1, 1966	— Filed Affidavit of Nicolas Disclafani in support of plaintiffs' motion for summary judgment.
April 1, 1966	— Filed Affidavit of Theodore E. Wolcott in support of plaintiffs' motion for summary judgment.
	—I—

* Figures in bold brackets [ ] refer to pages of Appendix in Circuit Court of Appeal.

** Figures with dashes — — refer to pages of original record on file in District Court.

Summary of Proceedings in District Court from Docket Entries

Date	Proceedings
April 1, 1966	— Filed Opinion No. 32,200, per MacMahon, D. J. — Plaintiffs' motion for partial summary judgment dismissing defendant's affirmative defenses is granted — trial stayed pending Appeal. [3a]
April 15, 1966	— Filed Defendant's Notice of Appeal — mailed copy to Theodore E. Wolcott, Esq.
May 24, 1966	— Filed Stipulation — original papers indicated shall constitute the Record on Appeal.

[4a]
—14—

Answer of Defendant
Alitalia—Linee Aeree Italiane, S.p.A.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

* * * * * *

—23—

* * * * * *

As and for a First Separate and Complete Defense to the First, Second, Third, Fourth and Fifth Causes of Action Alleged in the Complaint

52. Alleges that the transportation by air during the course of which the subject matter of these causes of action arose was being performed pursuant to a contract made by Defendant ALITALIA with each of Plaintiffs' decedents, Luigina Zocci Lisi and John Lisi, Jr., providing for international transportation within the meaning of and subject to the provisions of the Convention For The Unification Of Certain Rules Relating To International Transportation By Air and Additional Protocol, signed at Warsaw on October 12, 1929 (otherwise known as, and hereinafter referred to as, the "Warsaw Convention"); that Defendant ALITALIA duly complied with and performed all of the conditions and requirements of said Warsaw Convention; and that the rights of the parties herein are governed by said contracts of transportation and by the provisions of the said Warsaw Convention.

—24—

53. Alleges that Article 20 (1) of the said Warsaw Convention provides as follows:

[5a]

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

54. Alleges that Defendant ALITALIA and its agents took all necessary measures to avoid the damage alleged in the Complaint, and Defendant ALITALIA is therefore not liable to plaintiff.

As and for a Second Separate and Complete Defense to the First, Second, Third, Fourth and Fifth Causes of Action Alleged in the Complaint

55. Repeats, reiterates and realleges each and every allegation contained in paragraphs 52. and 53. of this Answer with the same force and effect as if herein set forth in full.

56. Alleges that it was impossible for Defendant ALITALIA or its agents to take all necessary measures to avoid the damage alleged in the Complaint and Defendant ALITALIA is therefore not liable to Plaintiff.

As and for a Third Separate and Partial Defense to the First, Second, Third, Fourth and Fifth Causes of Action Alleged in the Complaint

57. Repeats, reiterates and realleges each and every allegation contained in paragraph 52. of this Answer with

—25—

the same force and effect as if herein set forth in full.

58. Alleges that Article 22 of the said Warsaw Convention provides as follows:

[6a]

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

"(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

"(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

"(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

—26—

59. Alleges that Defendant ALITALIA did not agree by special contract, or by any contract, that plaintiff's dece-

dents Luigina Zocci Lisi and John Lisi, Jr., should be entitled to any higher limit of liability than hereinabove set forth in paragraph 58. of this Answer, and the liability, if any, of Defendant ALITALIA with respect to each of said decedents is therefore limited as follows: [7a]

a) with respect to the transportation of decedent Luigina Zocci Lisi—to the sum of $8,291.87;

b) with respect to the transportation of any checked baggage of decedent Luigina Zocci Lisi—to the sum of $16.58 per kilogram of weight of any such checked baggage; and

c) with respect to any objects of which decedent Luigina Zocci Lisi took charge herself—to the sum of $331.67;

d) with respect to the transportation of decedent John Lisi, Jr.—to the sum of $8,291.87;

e) with respect to the transportation of any checked baggage of decedent John Lisi, Jr.—to the sum of $16.58 per kilogram of weight of any such checked baggage; and

f) with respect to any objects of which decedent John Lisi, Jr. took charge himself—to the sum of $331.67.

As and for a First Separate and Complete Defense to the Sixth, Seventh and Eighth Causes of Action Alleged in the Complaint

60. Alleges that the transportation by air during the course of which the subject matter of these causes of action

[8a]

arose was being performed pursuant to a contract made by Defendant ALITALIA and Frank Lisi providing for international transportation within the meaning of and subject to the provisions of the Convention For The Unification of Certain Rules Relating to International Transportation By Air and Additional Protocol, signed at Warsaw on October 12, 1929 (otherwise known as, and hereinafter referred to as, the "Warsaw Convention"); that Defendant ALITALIA duly complied with and performed all of the conditions and requirements of said Warsaw Convention; and that the rights of the parties herein are governed by said contract of transportation and by the provisions of the said Warsaw Convention.

61. Repeats, reiterates and realleges each and every allegation contained in paragraph 53. of this Answer with the same force and effect as if herein set forth in full.

—28—

62. Alleges that Defendant ALITALIA and its agents took all necessary measures to avoid the damages alleged in the Complaint, and Defendant ALITALIA is therefore not liable to Plaintiff.

As and for a Second Separate and Complete Defense to the Sixth, Seventh and Eighth Causes of Action Alleged in the Complaint

63. Repeats, reiterates and realleges each and every allegation contained in paragraphs 60. and 53. of this Answer with the same force and effect as if herein set forth in full.

[9a]

64. Alleges that it was impossible for Defendant ALITALIA or its agents to take all necessary measures to avoid

the damage alleged in the Complaint and Defendant ALITALIA is therefore not liable to Plaintiff.

As and for a Third Separate and Partial Defense to the Sixth, Seventh and Eighth Causes of Action Alleged in the Complaint

65. Repeats, reiterates and realleges each and every allegation contained in paragraphs 60. and 58. of this Answer with the same force and effect as if herein set forth in full.

66. Alleges that Defendant ALITALIA did not agree by special contract, or by any contract, that Frank Lisi should be entitled to any higher limit of liability than hereinabove

set forth in paragraph 58. of this Answer, as realleged in paragraph 63. of this Answer, and the liability, if any, of Defendant ALITALIA to plaintiff is therefore limited as follows:

a) with respect to the transportation of Frank Lisi—to the sum of $8,291.87;

b) with respect to the transportation of any checked baggage of Frank Lisi—to the sum of $16.58 per kilogram of weight of any such checked baggage; and

c) with respect to any objects of which Frank Lisi took charge himself—to the sum of $331.67.

• • • • •

[10a]
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Motion Under Rules 56 and 12

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

And Related Cases Index Nos. 63 Civ. 1735, 63 Civ. 1736, 61 Civ. 641, 60 Civ. 4365

SIRS:

PLEASE TAKE NOTICE that pursuant to Rules 56 and 12 of the Federal Rules of Civil Procedure, and upon the annexed affidavit of Theodore E. Wolcott, sworn to October 12, 1965, and the exhibits attached thereto, and upon the pleadings and proceedings heretofore filed and had herein, the plaintiffs will move this Court, at the Chambers of the Honorable Lloyd F. MacMahon, U. S. D. J., at the Courthouse, Foley Square, City and State of New York, on the 28th day of October, 1965 at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order granting partial summary judgment, dismissing the first, second and third affirmative defenses interposed by the defendant Alitalia, and generally dismissing the defenses that the instant and the related actions are subject to the limitations of liability

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provided under the Warsaw Convention, and for such other and further relief as to the Court may seem just and proper in the premises.

Answering affidavits are demanded five days before the return date.

Motion Under Rules 56 and 12

Dated: New York, N. Y., October 12, 1965 [11a]

Yours, etc.,

THEODORE E. WOLCOTT
Attorney for Plaintiffs
36 West 44th Street
New York, N. Y. 10036

To:

CONDON & FORSYTH
Attorneys for Defendant
1 Rockefeller Plaza
New York, N. Y. 10020

[12a]
—129—

Affidavit of Theodore E. Wolcott

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THEODORE E. WOLCOTT, being duly sworn, deposes and says:

I am the attorney for the plaintiffs herein, and am fully familiar with the facts herein, and make this affidavit in support of the attached application for partial summary judgment dismissing the defenses of the Warsaw Convention, pursuant to which the defendant, an Italian flag air carrier, seeks to limit its liability for the wrongful deaths and serious injuries of the plaintiff's decedents or personal injury plaintiffs who were passengers on a Douglas DC-7C aircraft owned, operated and controlled by the defendant Alitalia.

The aircraft crashed within minutes of a night takeoff from Shannon Airport, Ireland, in the early hours of Feb-

—130—

ruary 26, 1960. The plane was headed west-bound over the North Atlantic for New York. The plaintiff Como brings this action on behalf of the Disclafani family, who were passengers on this airplane. They consist of the mother, a widow, Mrs. Caterina Disclafani, and her minor children, Giuseppe, Alfredo, Maria and Nicolas. The

[13a]

mother, Caterina, and the child, Alfredo, were killed in the accident, and the surviving children suffered serious personal injuries.

The aircraft involved in the flight herein took off from Rome, Italy, and made a technical stop at Shannon Airport for the purpose of refueling. The journey of the Disclafani family was from Tunis to New York, on the lines of Alitalia, as provided by the tickets issued by Alitalia at Tunis. The date and place of the issuance of the tickets is shown by a stamp on the upper right-hand corner of the face of the tickets. The photocopies of the tickets on the ticket stock of Alitalia are attached hereto as Exhibit A. An examination of the microscopic print on this ticket reveals that it is written in Italian, and to some extent, in English.

I

The Disclafani's transportation from Tunis to New York was not subject to the Warsaw Convention, since Tunisia at the time of the accident on February 25-26, 1960, was not a party to the Warsaw Convention. Article 1(2) reads:

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, *according to the contract made by the parties,* the place of departure and the

place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the *territories of two High Contracting Parties,* or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suze-

rainty, mandate or authority of another power, even [14a]
though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention." (Emphasis supplied.)

It is a matter of fact that "Tunisia was not a contracting party to the Warsaw Convention as of February 25-26, 1960." (Letter of U. S. Department of State, July 12, 1965.) In fact, it was not until November 15, 1965 that Tunisia deposited its instrument of adherence to the Warsaw Convention, which became effective on February 13, 1964. (Department of State letter, supra.) A true copy of the letter of the Department of State dated July 12, 1965, establishing the above, is annexed hereto as Exhibit B.

Accordingly, since Tunisia was not a party to the Warsaw Convention at the time of this accident for transportation issued in connection therewith, the limitations of the Warsaw Convention do not apply to the Disclafani claims. It is further averred that long before this accident, and by treaty of March 20, 1965, the full and sovereign independence of Tunisia was declared. A true photocopy of the treaty as set out in the release of the French Embassy dated March, 1956, is annexed hereto as Exhibit C. See also 51 Am. J. of Int. Law 683.

In connection with the above, it is stated, upon information and belief, that it was not until after 1956 that Tunisia

had its own airline, and it was not until November, 1963

that Tunisia decided that it would attempt to secure the liability limiting advantages of the Warsaw Convention for itself. Obviously, it is the concern of the foreign policy [15a] of a country in relation to its own economic interests to determine in the exercise of its sovereignty whether it wishes to adhere to the Warsaw Convention.

II

Even if the Disclafani transportation were Warsaw Convention transportation (which is not conceded), the limitations of the Warsaw Convention do not apply, since the ticket did not comply with the mandatory requirements of the Warsaw Convention. The Convention provides under Chapter II, Transportation Documents, Article 3, in pertinent part as follows:

"(1) For transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars: . . .

(e) A statement that the transportation is subject to the rules relating to liability established by the convention.

(2) The absence, irregularity or loss of the passenger ticket shall not effect the existence or validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

It is clear that the purpose of the above was to insure that the carrier gave clear notice to the passenger that he was being carried subject to the unusual limitations of

—133—

liability sought to be imposed. If the carrier omitted to

[16a]

give this clear notice, then the limitations of liability would not apply. But this omission or "irregularity", as provided in the first clause, will not otherwise affect the contract of international transportation which remained nevertheless subject to the Convention rules. It may be noted in passing that this is practically the only provision in the Convention that offers some protection to the passenger; the so-called presumptive liability up to $8300 clause being not only ridiculously inadequate, but illusory.

It is respectfully submitted that the ticket which is the only part pertinent here does not make a clear and unequivocal statement that the transportation is subject to the Warsaw Convention Rules of Liability as required.

Although there is nothing in the text of the Warsaw Convention with respect to the language in which the "contract made by the parties" shall be written, it must obviously refer to the official language of the country where the contract (ticket) was issued. The official language of Tunisia, the place where this ticket contract was issued, is Arabic. This well-known fact is further established by the exchange of letters with the Consulate General in New York of Tunisia. True copies of my letter of inquiry dated July 21, 1965 to the Consulate General of Tunisia in New York, and of his reply thereto, are annexed hereto as Exhibits D-1 and D-2 respectively. Since obviously Alitalia relies upon implied rather than actual notice to the

Disclafanis of the applicability of the Warsaw Convention, like any other implied notice or public notice, it must be in the official language of the country where such notice is given.

III

[17a]

With respect to all of the tickets issued to plaintiffs' decedents and to personal injury plaintiffs, such tickets nevertheless failed to comply with the specific mandatory requirements of Article 3 of the Warsaw Convention. At the very bottom of the face of the ticket there is some very light and microscopic print which appears unreadable, and even if it could be read, unclear. A true version of the English language portion is as follows:

> "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention *may be* applicable, and the Convention governs and in *most cases* limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." (Emphasis supplied.)

Even if the passenger were able to read this fine print it is obvious that he still would not know whether his trip was subject to the Warsaw Convention since there is no unequivocal statement to that effect. It "may or may not be applicable and only in some cases." For the passenger to know, he would have to first consult a lawyer highly specialized in the field of international air transportation.

Obviously, from all of the facts and circumstances herein, the passengers did not have adequate notice to afford them a reasonable opportunity to take measures to pro-

tect themselves against limitation of liability" as provided in Article 3. The statement was defective in that it was

—135—

unnoticeable, unreadable, and even if read, it did not clearly and unequivocally state it was subject to the rules of limitation of liability of the Warsaw Convention.

[18a]

CONCLUSION

The Court is respectfully asked to take judicial notice of the fact that the public policy of the State of New York and generally of the Congress of the United States is against limitation of liability for acts of negligence, not only for personal injury, but for wrongful death. The Court's attention is also respectfully called to the fact that not only has disapproval of the unjust, unfair and grossly inadequate limitations of liability been widely expressed by much of the judiciary and the press, but that recent indications from the State Department and the Senate Foreign Relations Committee as reported in the press are to the effect that this country may soon denounce the Warsaw Convention.

It is respectfully submitted that no issues of fact are present as to the subject matter of this motion for partial summary judgment, and that the application herein should be granted.

THEODORE E. WOLCOTT

(Sworn to October 12, 1965.)

[19a]
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Affidavit of Charles R. Angst

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

CHARLES R. ANGST, being duly sworn, deposes and says:

1. I am Traffic Manager, U.S.A., for Alitalia, defendant herein.

2. When the subject accident occurred, it was my responsibility to obtain all flight coupons which were used by all passengers on the subject flight. I obtained these flight coupons from our Rome offices. I submit with this affidavit all those flight coupons used by plaintiffs in this accident on the subject flight, with the exception of the *Cologgi* plaintiffs. These passengers were travelling on a passenger ticket issued by Transworld Airlines, Inc. I did obtain photocopies of the flight coupons used by the *Cologgi* passengers on the subject flight and they are submitted herewith.

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3. Also submitted herewith are complete forms of the complete passenger tickets identical to those issued to and used by the passengers on this flight. When all flight coupons have been used by the passenger, the remaining portion of the passenger ticket represented by the booklet

[20a]

is retained by the passenger. The carrier only receives and retains those flight coupons used out of each ticket.

4. I am unable to submit a form of the TWA ticket used by the *Cologgi* passengers. Nevertheless, both the Alitalia form of ticket and the TWA form of ticket are identical in their references to the Warsaw Convention.

5. Both Alitalia and TWA are members of the International Air Transport Association and, as such, are required to use the same form of ticket. At the time of the accident herein and at the time of the issuance of these tickets, the form of tickets used by both Alitalia and TWA were standard IATA tickets and contained the same statements as to the applicability of the Warsaw Convention.

6. The flight coupons used by these passengers are submitted herewith in an envelope marked Exhibit "A". The forms of complete tickets are submitted herewith in an envelope marked Exhibit "B".

CHARLES R. ANGST

(Sworn to October 27, 1965.)

[21a]

Exhibit A Annexed to Affidavit of Charles R. Angst

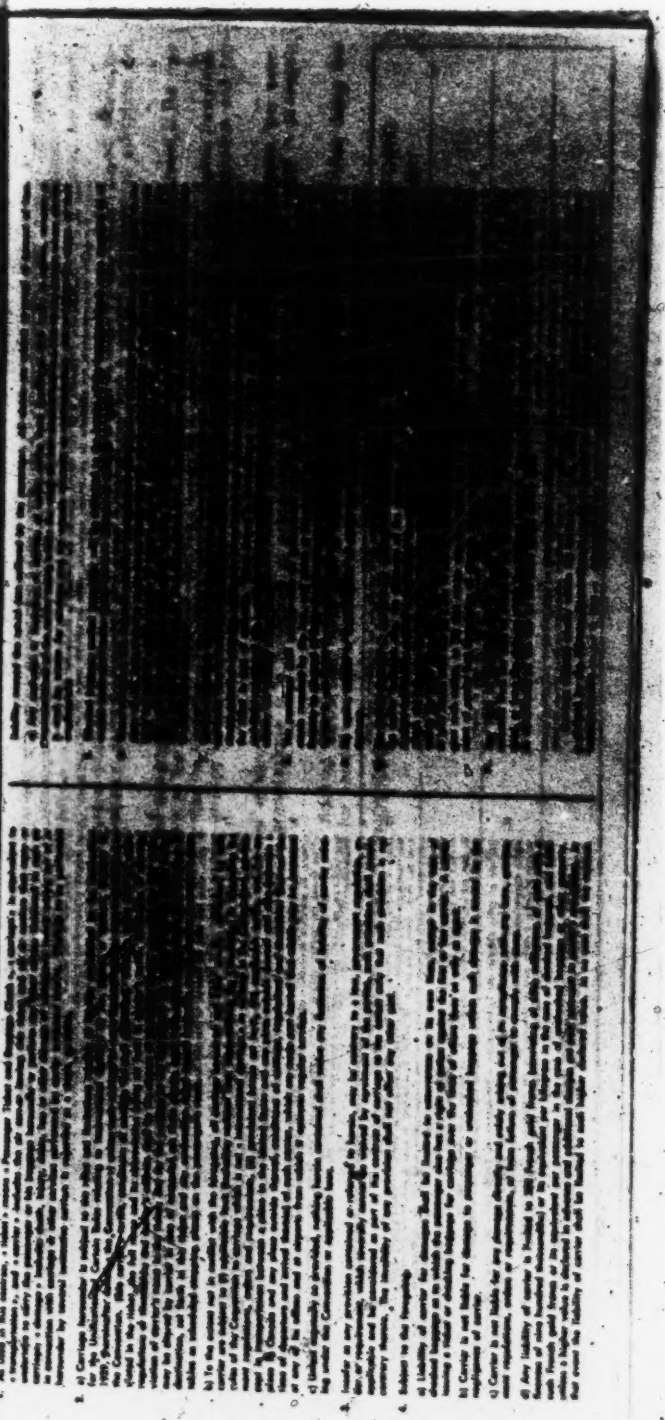
(See Opposite) ☞

[22a]

[23a]

Exhibit A Annexed to Affidavit of Charles R. Angst

(See Opposite) ☞



[25a]

Exhibit A Annexed to Affidavit of Charles R. Angst

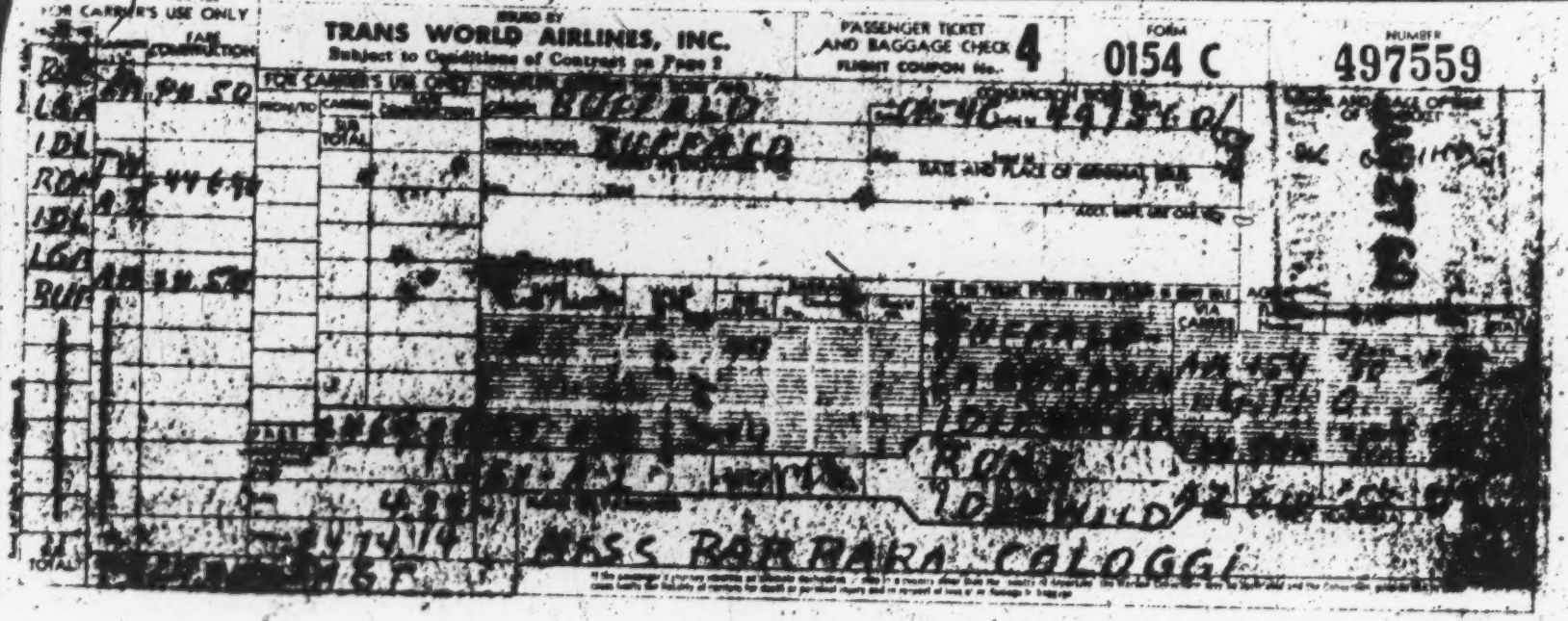
(See Opposite) ☞

2
ROCHELLE
1952
Nº 2122677

Exhibit A Annexed to Affidavit of Charles R. Angst

Trans World Airlines, Inc. Ticket, Form 0154-C—
No. 497559 issued to Miss Barbara Cologgi

(See Opposite) ☞


FOR CARRIER'S USE ONLY

ISSUED BY

TRANS WORLD AIRLINES, INC.

Subject to Conditions of Contract on Page 2

PASSENGER TICKET AND BAGGAGE CHECK 4

FORM 0154 C

NUMBER 497559

MISS BARBARA COLOGGI

Exhibit A Annexed to Affidavit of Charles R. Angst

Trans World Airlines, Inc. Ticket, Form 0154 C—
No. 497557 issued to Mrs. Rose Cologgi

(See Opposite) ☞

Exhibit A Annexed to Affidavit of Charles R. Angst

Trans World Airlines, Inc. Ticket, Form 0154 C—
No. 497555 issued to Mr. Rocco Cologgi

(See Opposite) ☞

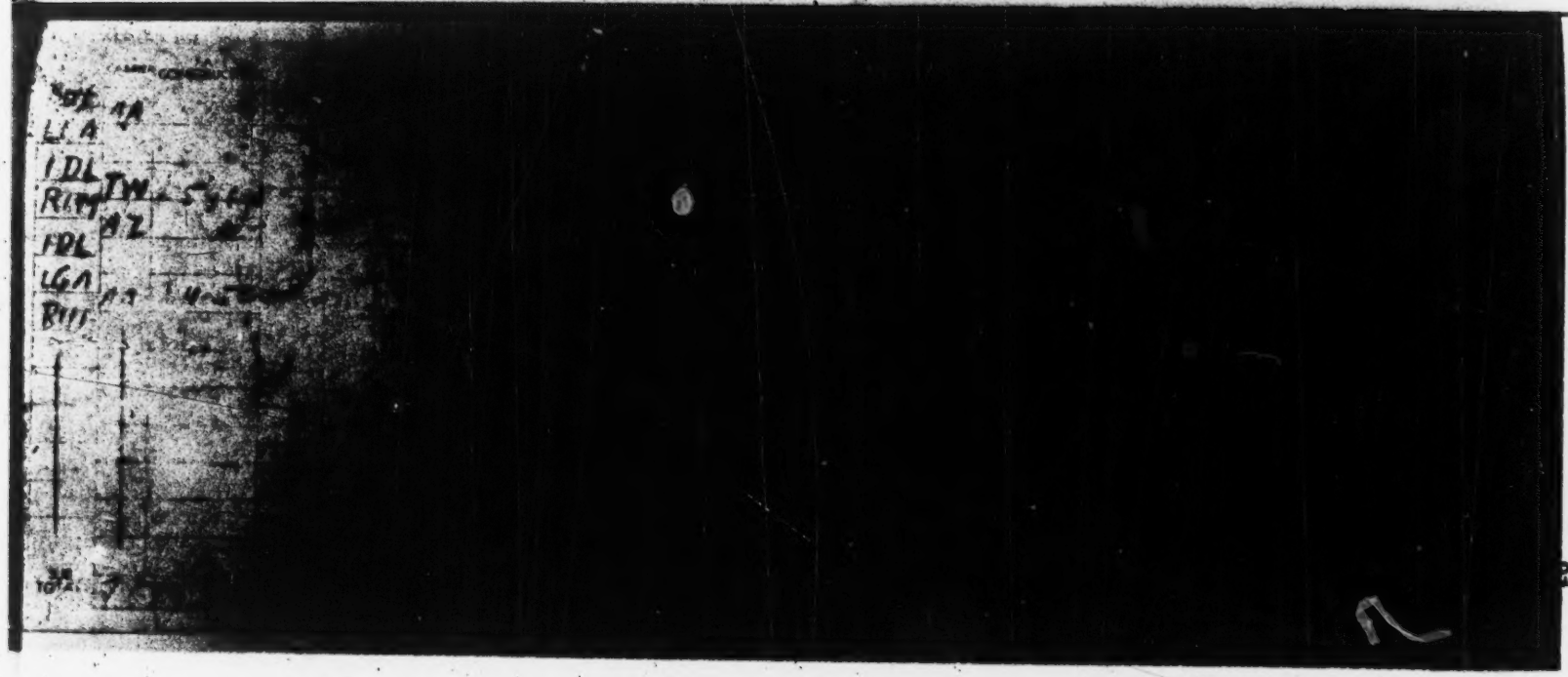

LEA
IDL
RIM
IDL
LGA
BIII

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 551—
No. 1135790 issued to Inf. Lisi

(See Opposite) ☞

ALITALIA
LINEE AEREE ITALIANE
1135790

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 551—
No. 1135788 issued to Mrs. Zocci L. Lisi

(See Opposite) ☞

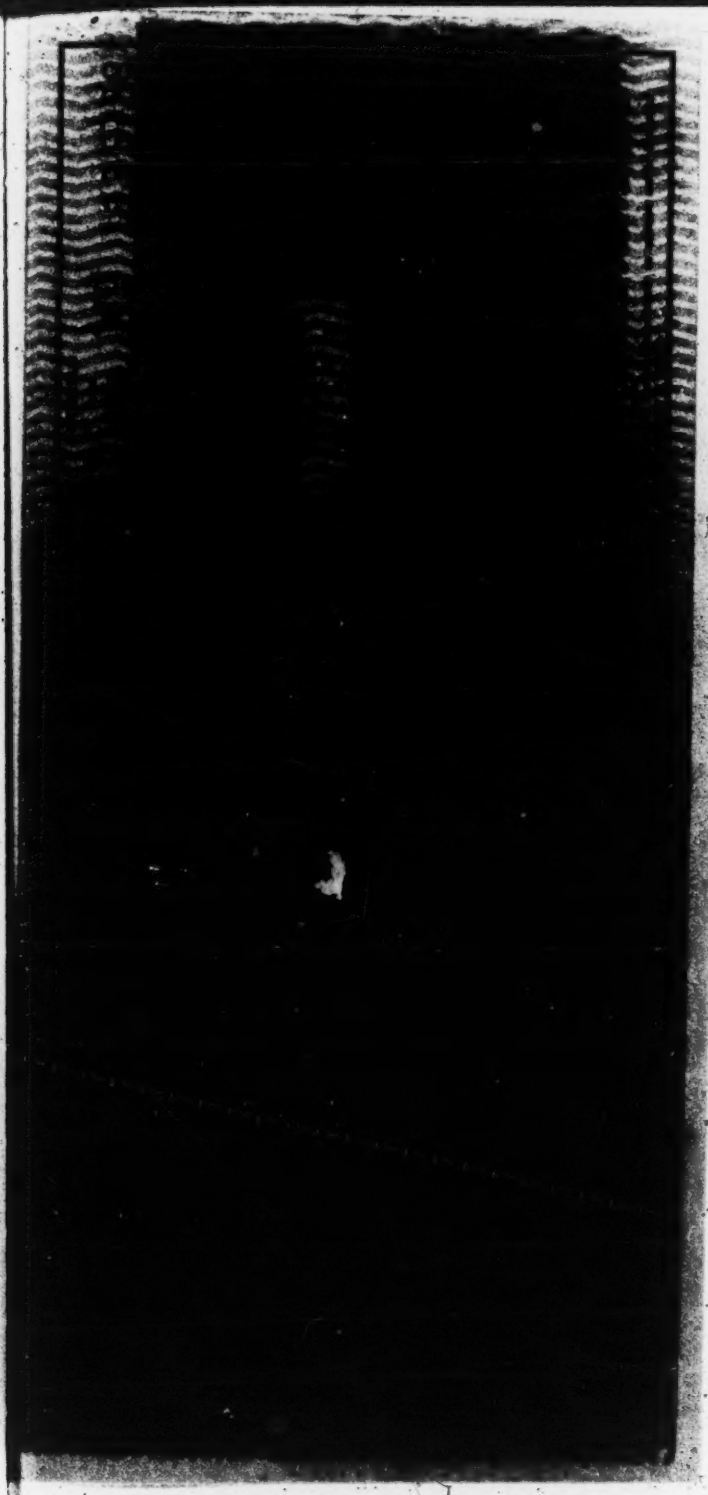


Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122676 issued to Mrs. Caterina Di Sclafani

(See Opposite) ☞

EMESSO DA
Issued by

ALITALIA

LINEE AEREE ITALIANE

BIGLIETTO PASSEGGERI
E CONTROLLO BAGAGLIO
Passenger Ticket and Baggage Check

TAGLIANDO DI VOLO N. **2**

MODELLO
Form
552

Nº 2122676

DATA E LUOGO DI EMISSIONE DEL BIGLIETTO
Date and place of issue of this ticket

22 FEB 66

AZ	618	25/2	20		OK	

RICONFERMARE DA:
Reconfirm to:

VIAGGIO AZ Tunis DATA 24/2/66

Ogni esemplare

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122677 issued to Mr. Alfredo Di Sclafani

(See Opposite) ☞

BIGLIETTO PASSEGGERI
E
CONTROLLO BAGAGLIO

PASSENGER TICKET and BAGGAGE CHECK

EMESSO DA
issued by

ALITALIA

CANCELLED

247050

AEROLINEE ITALIANE INTERNAZIONALI

I.A.T.A. Member

Via Leonida Bissolati, 20 - R[illegible]

1

Ogni passeggero dovrà esaminare attentamente questo biglietto e particolarmente le Condizioni riportate a pag. 3.
Each passenger should carefully examine this ticket, particularly the Conditions on page 4.

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 551—
No. 1135789 issued to C. M. Lisi

(See Opposite) ☞

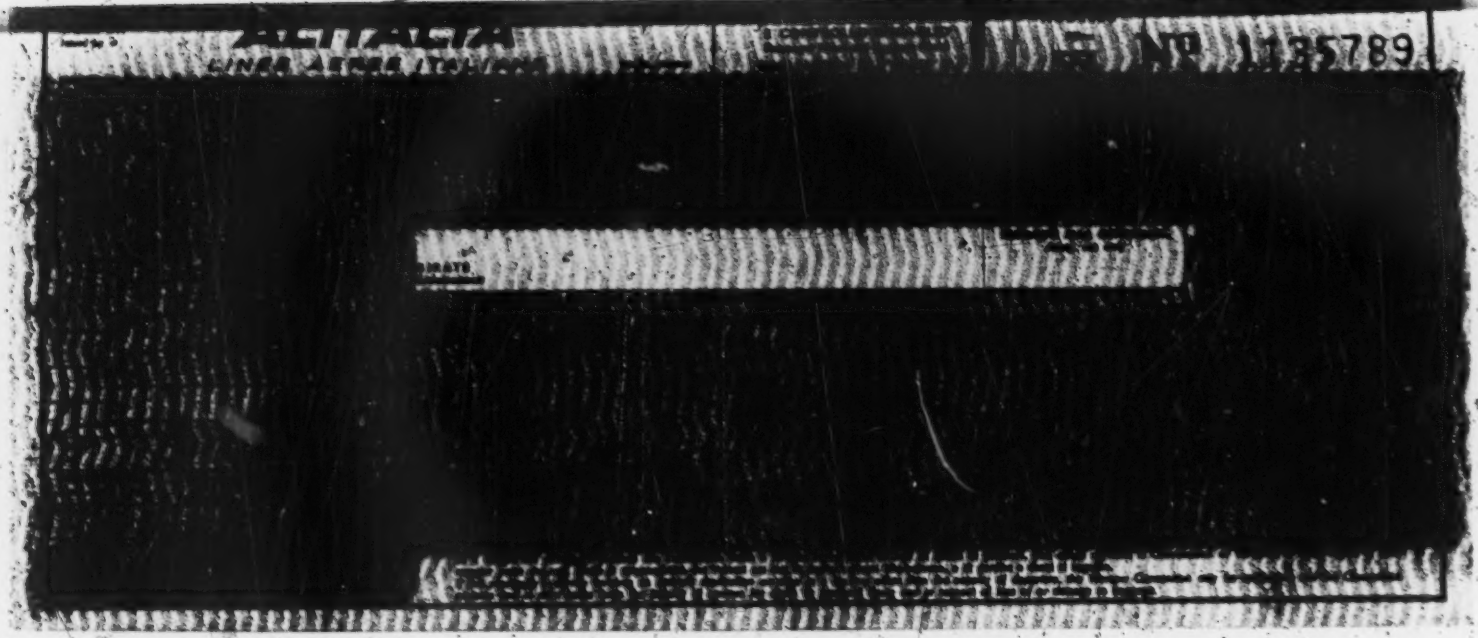


Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122678 issued to Miss Maria Di Sclafani

(See Opposite) ☞

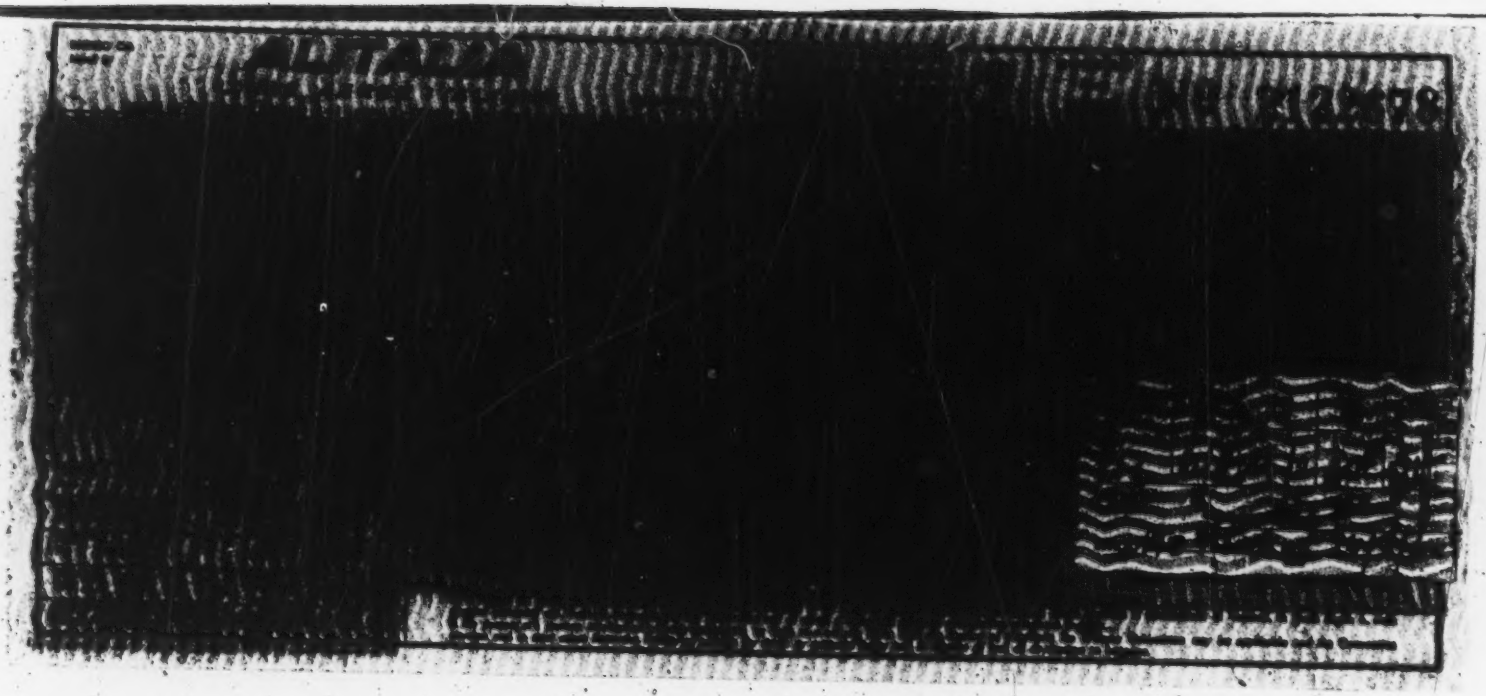


Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 551—
No. 11035229 issued to Mr. Joseph

(See Opposite) ☞

Nº 1035229

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 554—
No. 4077934 issued to Mrs. Farina Notte Angela Teresa

(See Opposite) ☞

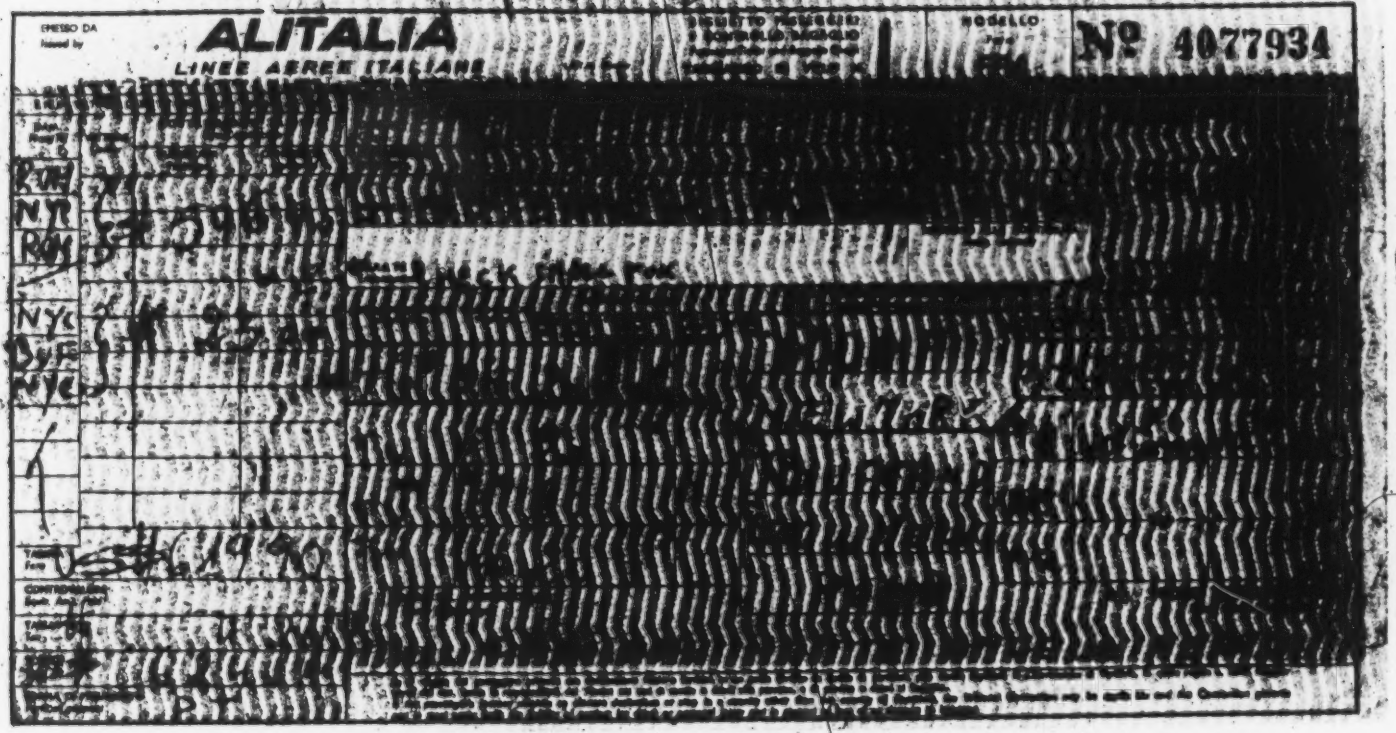

ALITALIA
LINEE AEREE ITALIANE
Nº 4077934

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122679 issued to Chd. Guiseppe Di Sclafani

(See Opposite) ☞

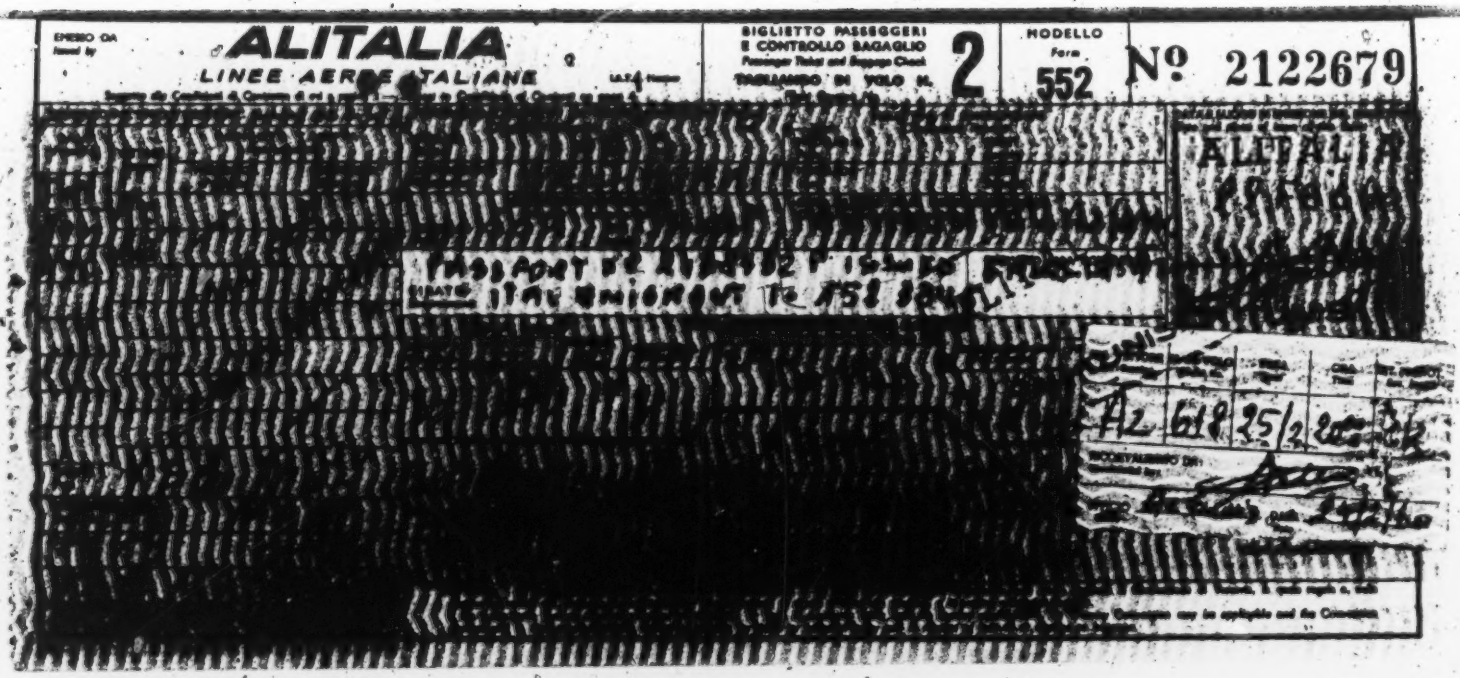

ALITALIA
LINEE AEREE ITALIANE
BIGLIETTO PASSEGGERI
E CONTROLLO BAGAGLIO
2
MODELLO
552
Nº 2122679
ALITALIA

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122675 issued to Mr. Nicola Di Sclafani

(See Opposite) ☞

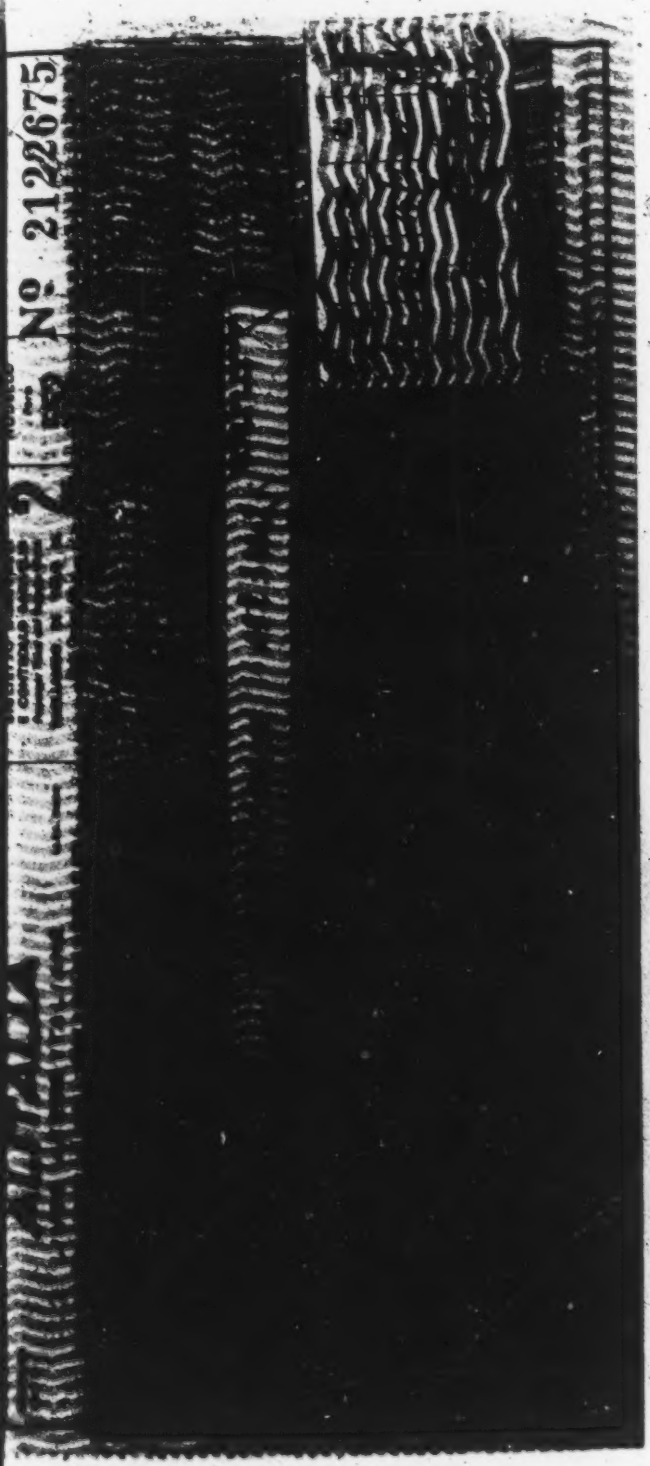

Nº 2122675

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Specimen Ticket of Form 551

(See Opposite) ☞

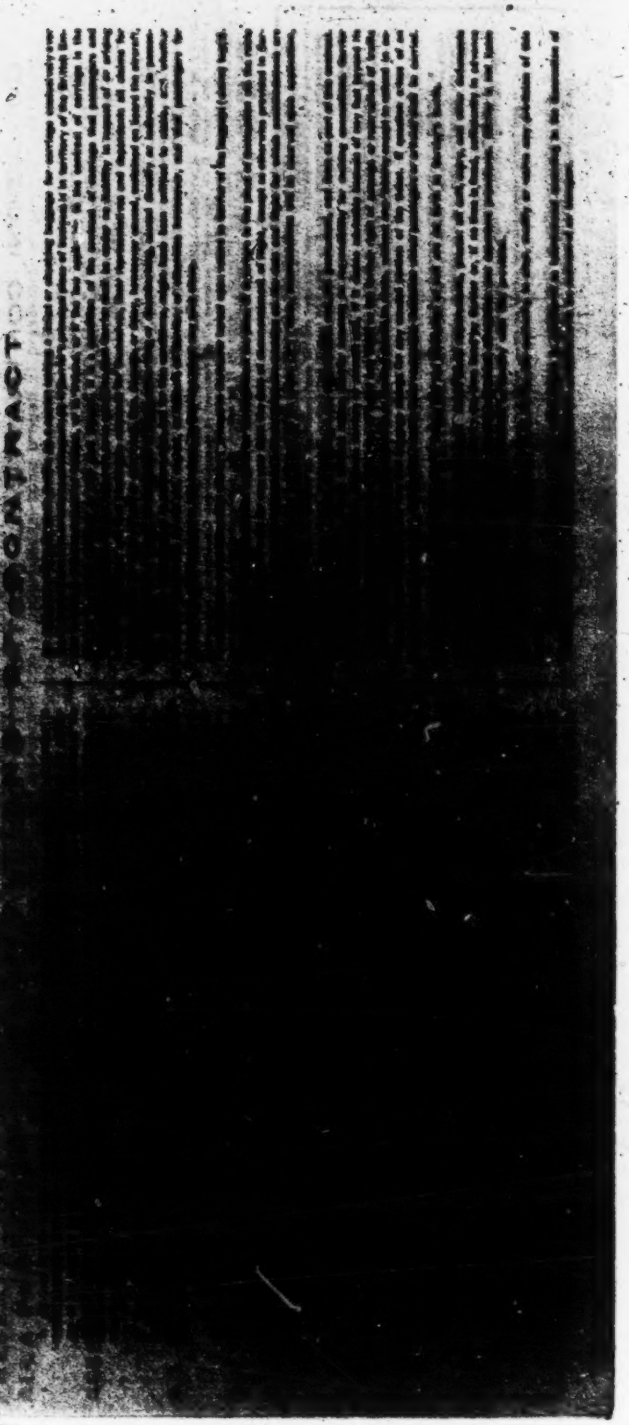

FORM NO. C-1 CONTRACT

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Specimen Ticket of Form 552

(See Opposite) ☞

BIGLIETTO PASSEGGERI

CONTROLLO BAGAGLIO

PASSENGER TICKET and BAGGAGE CHECK

EMESSO DA
issued by

Nº 4049684

ALITALIA

LINEE AEREE ITALIANE

I.A.T.A. Member

Via Leonida Bissolati, 20 [illegible] (Italia)

4

Ogni passeggero dovrà esaminare attentamente questo biglietto e particolarmente le Condizioni esposte a pag. 3.
Each passenger should carefully examine this ticket, particularly the Conditions on page 4.

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Specimen Ticket of Form 554

(See Opposite) ☞

[26a]
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Affidavit of Nicholas Disclafani

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

NICHOLAS DISCLAFANI, being duly sworn, deposes and says:

I am one of the claimants herein, and I am one of the surviving children of my mother, Caterina Disclafani, who was killed in the crash of an Alitalia airplane while taking off from Shannon Airport on February 26, 1960.

Our family, consisting of my mother, my brother, Alfredo Disclafani, then age 14 (who was killed), my sister Maria Disclafani, then age 13, my brother, Giuseppe Disclafani, then age 11, and myself, then age 18, were travelling together from Tunisia to New York on Alitalia Airlines on tickets issued by Alitalia Airlines.

I recall seeing the tickets, but did not read them except for knowing that the tickets were for transportation from Tunisia to New York. I did not read the printed matter

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on the tickets, and I most definitely did not read the fine print, to which I paid no attention whatsoever.

The print was so small that it was discouraging rather than encouraging to read.

Affidavit of Nicholas Disclafani

I was with my mother when she acquired the tickets for all of us. To the best of my recollection, knowledge, in-

[27a]

formation and belief, my mother was in the same position with respect to the tickets as decribed above with respect to myself, and she did not at any time read the printed matter, and most particularly did not read the matter in fine print, nor did anyone at any time instruct us to read the same, nor call the same to our attention nor mention the Warsaw Convention. This applies to the rest of the family.

NICHOLAS DISCLAFANI

(Sworn to December 15, 1965.)

[28a]
—155—

Combined Affidavit of
Maria Disclafani and Giuseppe Disclafani

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

MARIA DISCLAFANI and GIUSEPPE DISCLAFANI, each being duly sworn, depose and say:

We have read the affidavit of our brother, Nicolas, and to the best of our recollection and knowledge, we believe the same to be true.

MARIA DISCLAFANI

GIUSEPPE DISCLAFANI

(Sworn to December 15, 1965.)

[29a]
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Affidavit of Rocco Cologgi

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

ROCCO COLOGGI, being duly sworn, deposes and says:

I am the claimant herein, and I am the husband of Rose Cologgi, and father of Barbara Cologgi, who were killed in the crash of an Alitalia airplane while taking off from Shannon Airport on February 26, 1960.

Our family, consisting of my wife, my daughter, Barbara, then age 21, and myself, were travelling together.

I recall seeing the tickets, but did not read them except for knowing that the tickets were for air transportation between Buffalo, New York and Rome, Italy. I did not read the printed matter on the tickets, and I most definitely did not read the fine print, to which I paid no attention whatsoever. The print was so small that it was discouraging rather than encouraging to read.

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To the best of my recollection, knowledge, information and belief, my wife and daughter were in the same position with respect to the tickets as described above as I was, and they did not at any time read the printed matter, and most particularly did not read the matter in fine print,

[30a]

nor did anyone at any time instruct us to read the same, nor call the same to our attention nor mention the Warsaw Convention.

/s/ Rocco Cologgi

(Sworn to December 14, 1965.)

[31a]
—158—

Affidavit of Theodore E. Wolcott

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THEODORE E. WOLCOTT, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in the above entitled actions and I am fully familiar with the facts herein. I make this statement pursuant to the rules of this Court with respect to summary judgment, particularly Rule 9(g).

Statement Under Rule 9(g)

With respect to that branch of the motion for summary judgment concerning the sufficiency of the tickets in connection with the transportation herein under the requirements of the Warsaw Convention in that

(a) they do not make a prominent, clear and unequivocal statement that the transportation is subject to the Warsaw Convention rule of liability, as specifically required in the Convention;

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(b) the tickets are so profuse, their print is so microscopic, and their form and content generally so jumbled and confused as to constitute insufficient notice to the

[32a]

passenger that the Warsaw Convention is applicable to the transportation;

(c) and that the form of the tickets generally are so deficient as to constitute a failure of delivery of the tickets as required by the Warsaw Convention.

It is respectfully certified as follows:

There is no genuine issue to be tried in that the tickets in connection with the transportation involved herein which were issued to and in the possession of the respective plaintiffs or their decedents at the time they checked in at the airport of embarkation on the subject flight are as to the flight coupons contained in the envelope marked Exhibit A submitted on this motion by the defendant Alitalia, and as to the tickets as a whole, they were the same as the form ticket books contained in the envelope marked Exhibit B submitted on this motion by the defendant Alitalia.

WHEREFORE, it is hereby certified that there is no issue of fact as to the foregoing.

THEODORE E. WOLCOTT

(Sworn to February 15, 1966.)

[33a]
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Affidavit of Theodore E. Wolcott

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THEODORE E. WOLCOTT, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in the above entitled actions and I am fully familiar with the facts herein. I make this amended statement pursuant to the rules of this Court with respect to plaintiffs' motion for partial summary judgment, particularly Rule 9(g).

It is respectfully certified as follows:

There is no genuine issue to be tried in that the tickets in connection with the transportation involved herein which were issued to and in the possession of the respective plaintiffs or their decedents at the time they checked in at the airport of embarkation on the subject flight are as to the flight coupons contained in the envelope marked

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Exhibit A submitted on this motion by the defendant Alitalia, and as to the tickets as a whole, they were the same as the form ticket books contained in the envelope marked Exhibit B submitted on this motion by the defendant Alitalia.

WHEREFORE, it is hereby certified that there is no issue of fact as to the foregoing.

THEODORE E. WOLCOTT

(Sworn to February 15, 1966.)

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Statement By Defendant Pursuant to General Rule 9 (g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
and consolidated cases

[SAME TITLE]

This Statement of material facts is submitted pursuant to General Rule 9 (g) of this Court and in opposition to the Statements submitted by plaintiffs, consisting of Affidavits of counsel for plaintiffs dated February 15 and February 16, 1966.

1. Plaintiffs' "Statement" of February 15, 1966 consists of nothing more than legal argument by plaintiffs' counsel. The only material facts which can be gleaned from the two Affidavits of plaintiffs' counsel are that the passenger tickets issued to and used by plaintiffs and their decedents on the subject flight were the tickets heretofore submitted to the Court in connection with this Motion; further, that these tickets had been delivered to each passenger before he was accepted as a passenger by defendant Alitalia on the subject flight.

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2. As to the form and contents of the passenger tickets, defendant states that the tickets heretofore submitted to the Court are the ones issued by defendant to each passenger and used by each passenger for the subject flight. Defendant does not accept and disagrees with the legal arguments set forth in plaintiffs' "Statement" of material

Statement By Defendant Pursuant to General Rule 9 (g)

[35a]

facts dated February 15, 1966, as to the description and contents of the tickets contained in said Statement.

3. Defendant submits that the only material facts necessary to a determination of the pending Motion of plaintiffs to strike the Warsaw defenses are the following:

I. On the face of each flight coupon contained in each passenger ticket issued to and used by each plaintiff, the following statements are set forth:

(a) "Issued by Alitalia-Linee Aeree Italiane, S.p.A.—Subject to Conditions of Contract on page 4"; and

(b) "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

II. Included in the Conditions of Contract on page 4 of each passenger ticket is the following provision:

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"2 (a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called 'the Convention') unless such carriage is not 'international carriage' as defined by the Convention."

III. The passenger tickets used by the plaintiffs and their decedents on the subject flight had been delivered to them before they had been accepted as passengers. As evidenced by the flight coupons which have been submitted

Statement By Defendant Pursuant to General Rule 9 (g)

to the Court, the dates of issuance of the passenger tick-

[36a]

ets to plaintiffs and their decedents, respectively, were as follows:

Angelina Farina	19 February 1960
Rocco Cologgi	27 January 1960
Barbara Cologgi	27 January 1960
Rose Cologgi	27 January 1960
Caterina Disclafani	22 February 1960
Nicola Disclafani	22 February 1960
Maria Disclafani	22 February 1960
Giuseppe Disclafani	22 February 1960
Alfredo Disclafani	22 February 1960
Mrs. Zocci Lisi	Exchange Order for transportation originally issued 8 February 1960—subsequent date of issue of passenger ticket cannot be determined from copies.
John Lisi	
Frank Lisi	
Joseph Maiorano	20 January 1960

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4. The flight on which the foregoing persons traveled pursuant to their respective passenger tickets departed Rome at 9:00 p.m., 25 February 1960.

Statement By Defendant Pursuant to General Rule 9 (g)

Dated: New York, New York
February 18, 1966

Respectfully submitted,

CONDON & FORSYTH

By s/ .....
Attorneys for Defendant

[37a]
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Letter dated February 23, 1966

(Letterhead of Reynolds, Wolcott & Flack)

February 23, 1966

Hon. Lloyd F. MacMahon
U. S. D. J.
United States Courthouse
Foley Square
New York, N. Y. 10007

Re: Como and Lisi v. Alitalia
and related cases

Dear Judge MacMahon:

I am in receipt of statement of defendant Alitalia. It is evident that defendant has raised no issue as to the facts certified in plaintiff's statement, as confirmed in plaintiff's amended statement.

Plaintiffs are willing to concede that the respective tickets were made out on the dates stamped on the coupons, with the proviso that such stamps do not necessarily fix the time from the inception of which the tickets were in the actual possession of the respective passengers. Plaintiffs makes no objection to item 4 of defendant's statements.

I respectfully take this opportunity to recall to Your Honor that during the discussion of this matter by all counsel with you on Friday, February 11, 1966, it was conceded by all parties that the entire alleged notice given

Letter dated February 23, 1966

[38a]

to the passengers is contained in the ticket and no other notice was given.

Respectfully submitted,

Theodore E. Wolcott
Attorney for Plaintiffs

TEW/rh

cc: Condon & Forsyth, Esqs.
Louis G. Carlo, Esq.

[39a]

Opinion by MacMahon, *D.J.*

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 4365
and consolidated cases

[SAME TITLE]

APPEARANCES:

THEODORE E. WOLCOTT, Esq.
New York, N. Y.
Attorney for Plaintiffs

CONDON & FORSYTH, Esqs.
New York, N. Y.
(GEORGE N. TOMPKINS, JR., Esq.,
New York, N. Y., of counsel)
Attorneys for Defendant

MACMAHON, *District Judge*

These are consolidated actions for death, personal injuries or property damage suffered by passengers in a crash of defendant's airplane on February 26, 1960, in

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Shannon, Ireland, while en route from Rome to New York. Plaintiffs are residents and citizens of New York, and defendant is an Italian corporation. Jurisdiction is based on diversity.

Plaintiffs move for partial summary judgment dismissing all affirmative defenses which are based on the exclusion or limitation of liability provisions (Articles 20

[40a]

and 22) of the Warsaw Convention,[1] 49 Stat. 3000 (1934). All of the evidentiary facts material to the motion appear on the face of the tickets issued to the passengers on the flight involved, and there is no dispute about them.[2] Plaintiffs claim that these exculpatory defenses are not available to an airline unless the airline delivers a passenger ticket and, where applicable, a baggage check, which no-

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[1] The official title is "Convention for the Unification of Certain Rules Relating to International Transportation by Air." With but a single reservation immaterial here, adherence was advised June 15, 1934; declared June 27, 1934; and proclaimed October 29, 1934. See 49 Stat. 3000 et seq. (1934).

Article 20(1) provides:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Article 22 provides:

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [$8,300]. . . .

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger."

On November 15, 1965, the United States formally denounced the Warsaw Convention, effective May 15, 1966, unless the airlines serving the United States agree to raise the limitation on liability to $75,000, and ultimately to $100,000. See Kreindler, The Denunciation of the Warsaw Convention, 31 J. Air L. & Com. 291 (1965). Such denunciation does not affect these actions.

[2] The parties have submitted affidavits complying with Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York.

[41a]

tify the passenger that the exclusion or limitation of liability provisions of the Warsaw Convention are applicable to the flight, and that the tickets and checks delivered here did not notify the passengers of such provisions. Defendant claims that if a ticket and check are delivered to a passenger before departure, such defenses are automatically applicable to flights between nations adhering to the Convention even though the ticket and check do

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not notify the passenger of such provisions, and that, in any event, the tickets and checks delivered here so notified the passengers.

[1] The Warsaw Convention specifies that the provisions of the Convention which exclude or limit an airline's liability are unavailable unless the airline delivers a passenger ticket and baggage check.[3] The Convention also requires that the ticket and check contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention."[4] Read together, the intent of these requirements is to afford the passenger a reasonable opportunity to take measures to protect himself against the airline's exclusion or limitation of its liability. Indeed, the Convention specifically provides that "the carrier and the passenger may agree on a higher limit

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[3] Article 3(2) provides in pertinent part:

"[I]f the carrier accepts a passenger without a passenger ticket having been delivered, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

Article 4(4) provides in pertinent part:

"[I]f the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at . . . [4(3)] (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

[4] Articles 3(1)(e) and 4(3)(h).

[42a]

of liability."[5] Manifestly, if the ticket and check delivered by the airline fail to notify the passenger that the exclusion or limitation provisions of the Convention are applicable, the passenger is not afforded a reasonable opportunity to protect himself by deciding not to take the flight, entering into a special contract with the carrier, or taking out additional insurance.

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[2] We hold, therefore, that compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable.[6] *Cf. Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed. 2d 64 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Block* v. *Compagnie Nationale Air France*, 229 F. Supp. 801, 808 (N.D.Ga. 1964); Sand, Air Carriers'

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[5] Article 22(1).

[6] Article 4(4), pertaining to baggage checks (see footnote 3), specifically bars a carrier from excluding or limiting its liability under the Convention if it (a) fails to deliver a baggage check, or (b) delivers a baggage check which does not contain the required statement. However, Article 3(2), pertaining to passenger tickets, specifies only one ground for barring a carrier from excluding or limiting liability, namely, failure to deliver a passenger ticket. Defendant argues from this that in cases involving personal injury and death, the absence of the required statement from the passenger ticket is meaningless, and that so long as a passenger ticket is delivered before the passenger boards the plane, the carrier can exclude or limit liability. To support this contention, it cites *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D. N. Y. 1950), *aff'd*, 227 F. 2d 282 (1955), *cert. denied*, 350 U. S. 989, 76 S. Ct. 476, 100 L. Ed. 855 (1956). There it was held that a carrier could limit its liability for wrongful death even though it had failed to comply with Article 3(1)(c) by stating in the passenger ticket all the agreed places where the plane was to stop. However, we think the difference in importance between the statements required by Articles 3(1)(e) and 3(1)(c) destroys any argument that their absence from the ticket should be treated alike.

[43a]

Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention, 28 J. Air L. & Com. 260, 262-63 (1962). Thus, if the tickets and checks issued here did not so notify the passengers, the challenged affirmative defenses are unavailable and must be dismissed.

We are of the opinion that a jury could not reasonably find that the passenger tickets and baggage checks delivered here notified the passengers that the exclusion or limitation provisions of the Convention were applicable and, accordingly, hold as a matter of law that defendant cannot exclude or limit its liability under the Convention in the case at bar. We think one look at the tickets and checks, which were combined in the form of small printed booklets, com-

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pels this conclusion. We set forth below replicas of the only applicable pages of typical tickets delivered here:

Outside Front Cover

(See Opposite) ☞

BIGLIETTO PASSEGGERO
E
CONTROLLO BAGAGLIO

PASSENGER TICKET and BAGGAGE CHECK

2253538

ESSO DI

Issued

ALITALIA

LINEE AEREE ITALIANE

I.A.T.A. Member

Viale Maresciallo Pilsudski, 92 - ROMA (Italia)

2

Ogni passeggero dovrà esaminare attentamente questo biglietto e particolarmente le Condizioni esposte a pag. 3.
Each passenger should carefully examine this ticket, particularly the Conditions on page 4.

Opinion by MacMahon, D.J.

Page 4 of the Booklet [46a]

CONDITIONS OF CONTRACT

1. As used in this contract, « ticket » means « Passenger Ticket and Baggage Check », « carriage » is equivalent to « transportation », and « carrier » includes the air carrier issuing this ticket and all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other services incidental to such air carriage; « damage » includes death, injury, delay, loss or destruction of whatsoever nature arising out of or in connection with carriage or other services performed by carrier hereunder. Carriage to be performed hereunder by several successive carriers is regarded as a single operation.

2. a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929, (hereinafter called « the Convention ») unless such carriage is not « international carriage » as defined by the Convention. (The carrier's tariffs, conditions of carriage for such definition). Carrier's name may be abbreviated on the ticket, the full name of its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables; and carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; and for the purpose of the Convention the agreed stopping places (which may be altered by carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth in this ticket and any connection ticket issued hereunder, or, as shown in carrier's timetables as scheduled stopping places on the passenger's route.

b) To the extent not in conflict with the foregoing, all carriage hereunder and other services performed by each carrier are subject to (i) applicable laws (including national laws implementing the Convention or amending the rules of the Convention to carriage which is not « international carriage » as defined in the Convention), government regulations, orders and requirements, (ii) provisions herein set forth, (iii) applicable tariffs, and (iv) accepted by transportation hereunder a place in the United States and any place outside thereof and also between a place in Canada and any place outside thereof, conditions of carriage, regulations and timetables (but not the time of departure and arrival thereto) of each carrier, which are made part thereof and which may be examined at any of its offices and at airports from which it operates regular services.

c) Unless expressly so provided, nothing herein contained shall waive any limitation of liability of carrier existing under the Convention or applicable laws.

3. Insofar as any provision contained or referred to herein, may be contrary to a law, government regulation, order or requirement, which invalidly cannot be waived by agreement of the parties, such provision shall remain applicable and be considered as part of the footnote of carriage to the extent only that such provision is not contrary thereto. The invalidity of any provision shall not affect any other part.

4. Subject to the foregoing:

a) Liability of carrier for damages shall be limited to approximate on an even basis, except in the case of checked baggage as to which the passenger also has a right of action against the first or last carrier. A carrier issuing a ticket or checking baggage for carriage over the lines of others does so only as agent.

b) Carrier is not liable for damage to passenger or unchecked baggage unless such damage is caused by the negligence of carrier

c) Carrier is not liable for any damage directly and solely arising out of its compliance with any laws, government regulations, orders or requirements, or from failure of passenger to comply with same.

d) Any liability of carrier is limited to 250 French gold francs (consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths) or its equivalent per kilogram in the case of checked baggage, and 5,000 such French gold francs or its equivalent per passenger in the case of unchecked baggage or other property, unless a higher value is declared in advance and additional charges are paid pursuant to carrier's regulations. In that event the liability of carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.

e) Any exclusion or limitation of liability of carrier under these conditions shall apply to agents, servants or representatives of the carrier acting within the scope of their employment and also to any person whose aircraft is used by carrier for carriage and his agents, servants or representatives acting within the scope of their employment.

5. Checked baggage carried hereunder will be delivered to the bearer of the baggage check upon presentation of all original parts and carrier under carrier's contract of carriage or tariff.

6. Where validated, this ticket is good for carriage from the airport or the place of departure to the airport or the place of destination via the route shown herein and for the applicable class of service and is valid for one year from the date of commencement of flight except as otherwise provided in carrier's regulations. Each flight coupon will be accepted for carriage on the date and flight for which accommodation have been reserved when flight coupons are issued on an « open date » basis, accommodations will be reserved upon application subject to availability of space.

7. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch, but no particular time is fixed for the commencement or completion of carriage. Delayed flights, carrier may without notice substitute alternate carriers or aircraft and may alter or omit the stopping place shown on the face of the ticket in case of necessity. Times shown in timetables or elsewhere are approximate and not guaranteed, and form no part of this contract. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

8. The passenger shall comply with all government travel requirements, present all visas, exit and other documents required by the law, and arrive at the airport by the time fixed by carrier or, if no time is fixed, sufficiently in advance of flight themselves to permit completion of government formalities and departure procedures. Carrier is not liable for loss or expense due to passenger's failure to comply with this condition.

9. No agent, employee or representative of carrier has authority to alter, modify or waive any provision of this contract.

10. No claims shall be in the case of damage to baggage unless the person entitled to delivery complains to the carrier forthwith after the discovery of the damage and, at the latest, within seven days from the date of receipt and in the case of delay, within twenty-one days from the date on which the baggage has been placed at his disposal. Every complaint must be made in writing and forwarded within the time aforesaid. Where nothing is paid a transportation damage or delay in baggage, failure to give notice shall not be a bar to such claims whatever person has to be sent reasonably possible for him to give such notice, or [illegible] notice was not given due to fraud on the part of carrier, or [illegible] agent had knowledge of damage to passenger's baggage.

11. Any right to damages against carrier shall be extinguished unless an action is brought within two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. The method of calculating the period of limitation shall be determined by the law of the court [illegible] of the case.

Carriage effected wholly within the territory of [illegible], which causes for annulment, « international carriage » as defined by the Warsaw Convention, is governed the notice time and the liability regarding damages of Damage by Air.

Opinion by MacMahon, D.J.

[47a]

One of the Coupons

(See Opposite) ☞

ALITALIA

LINEE AEREE ITALIANE

BIGLIETTO PASSEGGERI E CONTROLLO BAGAGLIO
Passenger Ticket and Baggage Check

TAGLIANDO DI VOLO N. **2**

MODELLO Form **552**

Nº 2122677

EMESSO DA

DA TUNIS

A NEW-YORK

PASSAPORT Nº 2428732 P ISSUED

GIRATE ITAL EMIGRANT 1-152 3343

DATA E LUOGO DI EMISSIONE DEL BIGLIETTO
Date and place of issue of this ticket

ITALIA
12 FEB
TUNIS

DA TUNIS

A ROME

A NEW-YORK

VETTORE Az

VOLO 618

DATA 25/2

ORA

RICONVALIDATO DA

UFFICIO Az TUNIS DATA 24/2/

MR DI SCLAFANI ALFREDO

[48a]
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The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of "Conditions of Contract" crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.

"Lilliputian typography," *Eck* v. *United Arab Airlines, Inc.*, 20 App.Div.2d 454, 457 n.2, 247 N.Y.S.2d 820, 824, *rev'd on other grounds*, 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640 (1964), which must be read through "a magnifying glass," *Warren* v. *Flying Tiger Line, Inc.*, 234 F.Supp. 223, 230 (S.D. Cal. 1964), *aff'd*, 352 F.2d 494 (9th Cir. 1965), is at war with the intent of the Convention. This was recognized by our Court of Appeals in *Mertens* where one of the reasons for precluding the carrier from limiting its liability under the Convention was that the required statement "was printed in such a manner as to

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virtually be unnoticeable and unreadable. . . ." *Mertens* v. *Flying Tiger Line, Inc., supra* at 341 F.2d at 857.

We hold, therefore, that defendant failed to comply with Articles 3(1)(e) and 4(3)(h) of the Warsaw Convention and that the challenged affirmative defenses are unavailable to defendant in these actions.[7]

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[7] Plaintiffs also argue that the statements in the tickets and checks are wholly inadequate because framed in conditional terms. However, we think this argument meritless. If the statements were noticeable and

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Our decision involves a controlling question of law which we think should be immediately appealed under 28 U.S.C. § 1292(b). *Cf. Warren* v. *Flying Tiger Line, Inc., supra* 352 F.2d at 495. We have done our best to reconcile *Mertens* and *Grey* (see footnote 6), but until the Court of Appeals has had the last word, there will remain substantial ground for difference of opinion on whether failure to notify in accordance with Article 3(1)(e) has the effect we say, and whether the defendant failed to notify here as a matter of law. To clear the air on the law applicable to the facts shown here, an appeal is advisable. Moreover, an immediate appeal may materially advance the ultimate termination of this litigation.

Accordingly, plaintiffs' motions for partial summary judgment dismissing defendant's affirmative defenses are

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granted, and trial of the actions stayed pending decision of the Court of Appeals on the controlling question of

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readable, the passenger would have been sufficiently alerted to defendant's intention to use the Convention, wherever applicable, as a shield to ward off liability. This being so, the passenger could have called into play a variety of protective measures. *Accord, Seth* v. *British Overseas Airlines Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U. S. 858, 85 S. Ct. 114, 13 L. Ed. 2d 61 (1964); *Samuel Montague & Co.* v. *Swiss Air Transport Co.*, English Court of Appeals, Jan. 21, 1966.

A third argument made by plaintiff Como representing members of the Disclafani family, whose journey originated in Tunisia, is that since the official language of Tunisia is Arabic, and the tickets were printed in English and Italian, the Disclafanis were not given notice. We do not reach this argument here. For the purposes of this motion, plaintiff Como has withdrawn a fourth argument that Tunisia was not a party to the Convention at the time the Disclafanis commenced their journey.

whether the challenged affirmative defenses are available to defendant in the light of the facts shown here.

So ordered.

Dated: New York, N. Y.
April 1, 1966

/s/ LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

ADDITIONAL PROCEEDINGS

IN COURT OF APPEALS

FOR SECOND CIRCUIT

Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 30543

JOHN LISI, Estate

—v.—

ALITALIA LINEE AEREE ITALIANE, S.p.A.

4- 7-66	Filed motion for leave to appeal under Rule 1292 (b) (& in 30544 thru 47)
4-12-66	Filed affidavit in response to motion for leave to appeal (& in 30544 thru 30547)
4-14-66	Motion for leave to appeal granted (endorsed)—and filed order (& in 30544 thru 30547)
4-18-66	Filed motion to add to general calendar to be heard before summer recess, etc. (& in 30544 thru 30547)
4-25-66	Filed affidavit in opposition to motion to add to general calendar, etc. (& in 30544 thru 30547)
4-25-66	Filed order denying motion for preference, etc. (& in 30544 thru 30547)
5-19-66	Filed motion to limit record (& in 30544 thru 30547)
5-23-66	Motion to limit record withdrawn in Open Court (& in 30544 thru 30547)

Docket Entries

5–25–66	Filed record (original papers of District Court) (& in 30544-47)
6–16–66	Filed order extending time to file appellant's brief & appendix to 7-22-66; appellees brief & appendix, if any by 9-2-66; appellant's reply brief if any by 9-16-66 (& in 30544-5-6-7)
7– 7–66	Filed motion for leave to file brief as amicus curiae (Speiser, Shumate, etc.) (& in 30544 thru 47)
7–12–66	Filed memorandum in opposition to motion for leave to file brief as amicus curiae (& in 30544 thru 7)
7–15–66	Motion for leave to file brief as amicus curiae denied (endorsed)—and filed order (& in 30544-7)
7–22–66	Filed appendix, appellant (& in 30544 thru 30547)
7–22–66	Filed brief, appellant (& in 30544 thru 30547)
8–16–66	Filed motion to extend time to file appellees brief, etc. (& in 30544 thru 30547)
8–19–66	Filed affidavit of service (& in 30544 thru 30547)
8–19–66	Appellee shall file brief by 10-7-66; appellant's reply brief by 10-24-66 (& in 30544-7)
9–29–66	Filed motion to adjourn argument; extend time to file appellees brief (& in 30544 thru 7)
9–30–66	Filed application and order (endorsed) denying motion to adjourn the argument of appeal (& in 30544 thru 47)

Docket Entries

9–30–66	Filed affidavit in opposition to motion for adjournment (& in 30544 through 47)
10– 7–66	Filed brief, appellees (& in 30544 thru 47)
10–24–66	Filed reply brief, appellant (& in 30544 thru 47)
10–26–66	Argument heard (by: Lumbard, ChJ., Moore & Kaufman, CJJ)
12–16–66	Judgment Affirmed, Kaufman, CJ (& in 30544 thru 7)
12–16–66	Dissenting in separate opinion, Moore, CJ (& in 30544 thru 7)
12–16–66	Filed judgment
12–29–66	Filed petition for rehearing and rehearing in banc (& in 30544 thru 7)
2– 6–67	Petition for rehearing denied, Per Curiam (& in 30544 thru 7)
2– 6–67	Filed order denying petition for rehearing (& in 30544 thru 7)
2– 6–67	Petition for rehearing in banc denied, Per Curiam (& in 30544 thru 7)
2– 6–67	Filed order denying petition for rehearing in banc (& in 30544 thru 7)
2– 6–67	Filed motion to stay issuance of mandate (& in 30544 thru 7)
2–20–67	Motion to stay issuance of mandate granted under Rule 28(c) (endorsed)—and filed order (& in 30544 thru 7)
3– 3–67	Certified appendices and proceedings to Condon & Forsyth, Esqs. (& in 30544 thru 7)

Docket Entries

3–21–67	Filed certificate of filing of petition for writ of certiorari (& in 30544 thru 47)
3–22–67	Filed notice of filing of petition for writ of certiorari (& in 30544-thru 47)
11– 9–67	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 30544-5-6-7)

Opinion of Court of Appeals for Second Circuit

(13)*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 91-95—September Term, 1966.

(Argued October 26, 1966 Decided December 16, 1966.)

Docket Nos. 30543-4-5-6-7

JOHN LISI, etc., *et al.*,

Appellees,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and KAUFMAN, *Circuit Judges.*

Appeal, pursuant to 28 U. S. C. §1292(b), from a partial summary judgment, MacMahon, *J.*, United States District Court for the Southern District of New York, dismissing appellant's affirmative defenses based on the Warsaw Convention, 49 Stat. 3000, et seq.

Judgment affirmed.

GEORGE N. TOMPKINS, JR., New York, N. Y. (Austin P. Magner, Condon & Forsyth, New York, N. Y., on the brief), *for appellant.*

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* Figures in bold parentheses refer to pages of Appendix to Petition for Writ of Certiorari.

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THEODORE E. WOLCOTT, New York, N. Y. (Alfred W. Gans, New York, N. Y., on the brief), *for appellees.*

KAUFMAN, *Circuit Judge:*

The question presented on this appeal is whether Alitalia's liability, arising from the crash of one of its planes, is limited by the provisions of the so-called Warsaw Convention.[1]

On February 26, 1960, while en route from Rome to New York, Alitalia's airplane crashed shortly after taking off from Shannon, Ireland. Five suits were brought and consolidated in the District Court for wrongful death, personal injuries and property damage, allegedly suffered by thirteen of the passengers aboard the craft at the time of the disaster. The appellees are citizens of New York, while appellant is an Italian corporation. Jurisdiction is based on diversity of citizenship, 28 U. S. C. §1332(a)(2).

In answering the complaints, Alitalia pleaded as affirmative defenses those Articles of the Convention which serve to exclude or limit an airline's liability to its passengers. Prior to trial, the appellees moved for a partial summary judgment to dismiss these affirmative defenses, asserting that they were not available because appellant had failed properly to notify the passengers of the applicability of the

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[1] 49 Stat. 3000-26. The official title is "Convention for the Unification of Certain Rules Relating to International Transportation by Air," hereinafter referred to as "Convention."

The Convention was concluded at Warsaw, Poland, on October 12, 1929, and proclaimed by President Roosevelt on October 29, 1934. Over ninety countries have become signatories to the Convention.

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Convention. Judge MacMahon agreed with appellees and granted their motion. He also stayed the trial pending decision by us "on the controlling question of whether the challenged affirmative defenses are available to defendant [Alitalia] in the light of the facts shown here." 253 F. Supp. 237, 243 (S. D. N. Y. 1966). This Court granted appellant's application for leave to appeal pursuant to 28 U. S. C. §1292(b).[2]

I.

It is conceded that the flight in question meets the definition of "international transportation" contained in Article 1 of the Convention.[3] Therefore, the provisions of the Convention quite properly govern the present action. See *Eck* v. *United Arab Airlines*, 360 F. 2d 804, 808 (2d Cir. 1966).

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[2] "(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[3] "(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. . . .

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated within the territories of two High Contracting Parties. . . ." 49 Stat. 3014.

Alitalia's main argument can be stated quite simply. Under Articles 17 and 18 of the Convention, 49 Stat. 3018-19, the carrier is liable for the death or bodily injuries suffered by passengers while on board its aircraft, and for destruction or loss of checked baggage. But, this liability, it says, is limited by Article 22, 49 Stat. 3019, which provides:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [approximately $8300] . . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.[4]
>
> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs [approximately $17] per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. . . .
>
> (3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs [approximately $332] per passenger.

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[4] Prior to the Hague Protocol of 1955 (see note 7, *infra*), the carrier was not liable even for this limited amount "if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures," Article 20, 49 Stat. 3019; or if "the carrier proves that the damage was caused or contributed to by negligence of the injured person [and] the court . . . in accordance with the provisions of its own law, exonerates the carrier wholly or partly from his liability." Article 21, 49 Stat. 3019.

It is clear, however, that under other Articles of the Convention, these limitations on liability are not applicable if the carrier fails to deliver to the passenger a ticket or

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a check for baggage.[5] These Articles, moreover, provide that the ticket and check shall contain certain specified information, including "a statement that the transportation is subject to the rules relating to liability established by this convention."[6] Thus, it would appear, that unless the carrier furnishes to the passenger a ticket or baggage check containing the appropriate statement, it may not restrict its liability as circumscribed by the Convention Articles.

Alitalia responds, however, by arguing that there is a crucial difference in the language between Articles 3 and 4. While Article 4(4), it says, denies the carrier limited liability "if . . . [it] accepts baggage without a baggage check having been delivered, *or if the baggage check does not contain the particulars*" specified (emphasis added), the only ground stated in Article 3(2) for denying limited liability for the personal injuries or death of passengers, is the carrier's failure to deliver a ticket. Thus, we are asked to apply the principle *expressio unius est exclusio alterius* and to hold that failure to give notice on the passenger ticket that the flight is subject to the Convention's rules, will not deprive the carrier of the substantial de-

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[5] "[I]f the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." Article 3(2), 49 Stat. 3015.

"[I]f the carrier accepts baggage without a baggage check having been delivered . . . the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liabilty." Artcle 4(4), 49 Stat. 3016.

[6] Article 3(1)(e), 49 Stat. 3015; Article 4(3)(h), 49 Stat. 3016.

limitation of liability for personal injuries or death. All that is required, urges Alitalia, for this right to vest, is that a ticket be delivered to the passengers.

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II.

It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Frankfurter stated it, a "verbal prison." *Sullivan* v. *Behimer,* 363 U. S. 335, 358 (1960) (Frankfurter, *J.,* dissenting). The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, "words are such temperamental beings that the surest way to lose their essence is to take them at their face." 1942 Address by Judge Hand to the Massachusetts Bar Association. Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra.*

This is not the first occasion on which we have been called upon to intepret the language of the Convention's delimiting provisions. For example, in *Mertens* v. *Flying Tiger Line, Inc.,* 341 F. 2d 851 (2d Cir.), *cert. denied,* 382 U. S. 816 (1965), we were asked to decide whether presenting a ticket to a passenger after he boarded the carrier's plane, constituted a "delivery" within the meaning of Article 3(2). We stated:

> We read Article 3(2) to require that the *ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to pro-*

tect himself against the limitation of liability. Such self-protective measures, could consist of for example, deciding not to take the flight, entering in a special

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contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that "the carrier and the passenger may agree to a higher limit of liability," (Article 22(1)) and there would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket *be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.*" *Id.* at 856-57 (emphasis added).

We held, accordingly, that the delivery was inadequate, and the Convention's fixed limits of liability were not available.

Later, a similar result was reached by the Ninth Circuit in *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494 (1965). There the passenger was given a "boarding ticket" or "pass" at the foot of the ramp leading to the aircraft. The Court decided that the "delivery" must be made sufficiently in advance so that the passenger will have the opportunity to take self-protective measures, such as purchasing additional insurance if he so chooses. The "delivery" of a boarding ticket at the foot of the ramp as the plane was about to depart, did not suffice therefore. The carrier, accordingly, was barred by Article 3(2) from availing itself of the Convention's liability limitation provisions.

We believe that the reasoning of the *Mertens* and *Warren* decisions is apposite to the case now before us. The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized[7]—are advantageous to (20) the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It

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[7] See generally Sand, "Air Carriers' Limitations of Liability and Air Passengers' Accident Compensation Under the Warsaw Convention," 28 *J Air L. & Com.* 260 (1961-62).

Criticism of the Convention's limits on liability began to crystallize in the early 1950's as a result of the impact on the public arising from a plane crash in 1943, in which the entertainer Jane Froman was seriously injured. Despite the extent of her injuries, the size of her medical bills, and the curtailment of her blossoming career, her award against Pan American was limited to $8300. *Ross* v. *Pan American Airways,* 299 N. Y. 88 (1949), *cert. denied, sub nom. Froman* v. *Pan American Airways, Inc.,* 349 U. S. 947 (1955). See Kreindler, "The Denunciation of the Warsaw Convention," 31 *J. Air L. & Com.* 291, 294 (1965).

In 1955, the Hague Conference was called, and from it came the so-called Hague Protocol, which would have doubled the limits on liability for personal injuries to $16,600. Although signed by the United States, it was not ratified by the Senate.

On November 15, 1965, the United States sent a Notice of Denunciation to the Polish Government stating that this country opposed the Convention's low limits on liability for personal injuries, and would withdraw from the Convention at the end of six months, pursuant to Article 39, 49 Stat. 3022. *Id.* at 303. The State Department made it

is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled domestically, the amount they may

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recover in the event of an accident is drastically reduced. In short, it is clear from the *ratio decidendi* of the *Mertens* and *Warren* cases, that the inquiry that must be made if the Convention's Articles are to be given meaning, is "whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures . . . ." *Mertens* v. *Flying Tiger Line, Inc., supra* at 857.[8]

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known, however, that the denunciation would be withdrawn if the world's international air carriers agreed to raise the limitation first to $75,000 and ultimately to $100,000. An interim agreement was reached among the carriers, including Alitalia, in the Spring of 1966, providing for limits of liability of $58,000 plus costs of litigation, or $75,000 inclusive of costs of litigation, under conditions of absolute liability. On May 14, 1966, the United States withdrew its previous "Notice of Denunciation." See "The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation," 32 *J. Air L. & Com.*, No. 2, p. 243 (1966).

[8] Alitalia's reliance on *Grey* v. *American Airlines*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956), is misplaced. In that case defendant's plane, while en route from New York to Mexico City, crashed near Dallas. Although the flight was scheduled to make stops at Washington, D. C. and Dallas, this information was not contained on the ticket given to the plaintiffs, despite the provision in Article 3 of the Convention that all "agreed stopping places" shall be listed. Plaintiffs claimed that because of this omission, defendant was precluded from claiming limited liability under the Convention. Plaintiffs' motion to strike the carrier's defenses based on the Convention was denied by the district court, 95 F. Supp. 756 (S. D. N. Y. 1950), and we affirmed, finding that the motion was based on a "technical and wholly unsubstantial alleged omission" 227 F. 2d at 284.

Our decision in *Grey* is perfectly consistent with the holdings in *Mertens* and *Warren, supra*. In *Grey*, the plaintiffs boarded the plane in New York and were headed for Mexico City. The fact that the ticket failed to list the intermediate stops in Washington, D. C. and Dallas, in no way deprived them of "a reasonable opportunity to take self-protec-

III.

We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice.[9] On the front of the ticket and baggage check, in exceedingly small print, was the following message: "Each passenger should carefully examine this ticket, particularly the Conditions on page 4." And, at this point, we note that one of our reasons in *Mertens* v. *Flying Tiger Line, Inc.*, *supra*, for precluding the carrier from limiting its liability under the Convention was that the required statement on the ticket "was printed in such a manner as to virtually be unnoticeable and unreadable . . ." *Id.* at 857.

Judge MacMahon appropriately characterized the "notice" to the passengers in his pithy conclusion as "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'. . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that their presence is concealed."[10] 253

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tive measures," since those stops did not change the "international" character of the flight so far as plaintiffs were concerned. See Article 1. Therefore, "delivery" of the ticket had taken place, and the defendant was entitled to avail itself of the Convention's limits on liability.

[9] The parties have agreed that this is a question of law for the court to resolve. A replica of the ticket may be found in the district court's opinion, 253 F. Supp. at 240-42.

[10] Moreover, even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon. For example, the passenger is referred to the carrier's tariffs in order to determine whether his flight is considered "international carriage"; and the carrier's liability is expressed in terms of "French gold francs

F. Supp. at 243. Accord, *Warren* v. *Flying Tiger Line, Inc.*, *supra* at 497. But see *Seth* v. *British Overseas Airways*.

(consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths)."

In 1963, the Civil Aeronautics Board took cognizance of the difficulty that the average passenger would have interpreting this language and issued what is now 14 C. F. R. §221.175, which provides in part:

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself (23) of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on
Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $8,290 and limits liability for loss or damage to baggage.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statements shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) on the ticket envelope.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also cause to be displayed continuously in a conspicuous public place at each desk, station, and position in

Corp., 329 F. 2d 302 (1st Cir.), *cert. denied*, 379 U. S. 858 (1964).

We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant.

Affirmed.

MOORE, *Circuit Judge* (dissenting):

The majority in their opinion indulge in judicial treaty-making. The language of the treaty (referred to as the Warsaw Convention) is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem.

Passenger tickets were delivered to plaintiffs and their decedents on various dates between January 20, 1960 and February 20, 1960. The flight on which they travelled pursuant to their tickets did not depart until February 25, 1960. The ticket contained the particulars specified in Article 3(1) of the Convention, albeit the reference to the provisions of the Convention with respect to death or injury was in exceedingly small type.

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the United States which is in charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section. Such statement shall be printed in bold face type at least one fourth of an inch high.

The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a "one-sided advantage" is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability. To support their argument they refer, quite illogically in my opinion, to cases in which the courts have held that there was no real delivery of a ticket to the passenger as contemplated by the treaty.

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Cases based upon facts tantamount to no effective pre-flight ticket delivery,[1] are scarcely relevant to this case where the passengers had their tickets from 3 to 36 days before departure. Were actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both understood and agreed to the limitation.

The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts. Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual

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[1] *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2 Cir. 1965) (Military officer already on board an aircraft about to take off when ticket delivered); *Warren* v *Flying Tiger Line, Inc.*, 352 F. 2d 494 (9 Cir. 1965) (Soldiers handed boarding tickets at foot of ramp leading to plane about to take off); *Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804 (2 Cir. 1966) (Warsaw Convention involved only on question of jurisdiction and venue).

understanding notice. Furthermore, for the courts to say that a jury could not reasonably have found that the ticket gave the passenger the required notice is, upon a motion for partial summary judgment, to usurp the time-honored function of the jury.

For these reasons, I would reverse.

Judgment in *Lisi* v. *Alitalia*

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian FRANK LISI, an infant under the age of 14 years,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

(27)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#91

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Judgment in *Maiorano* v. *Alitalia*

(28)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOSEPH MAIORANO,
Plaintiff-Appellee,

—v.—

ALITALI-LINEE AEREE ITALIANE, S.p.A.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

(29)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#92

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Judgment in *Como* v. *Alitalia*

(30)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

NICOLINA COMO, as Guardian *ad Litem* of NICOLAS DISCLAFANI, MARIA DISCLAFANI and GIUSEPPE DISCLAFANI, and as Administratrix of the Estate of CATERINA DISCLAFANI, deceased and ALFREDO DISCLAFANI, deceased,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

(31)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#93

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Judgment in *Cologgi* v. *Alitalia*

(32)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

ROCCO COLOGGI, Individually, and as Administrator of the Estate of ROSE COLOGGI, deceased and of BARBARA COLOGGI, deceased,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

(33)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#94

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Judgment in *DiBiase v. Alitalia*

(34)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

ROSINA DIBIASE, Individually, and as Administratrix of the Estate of NOTTE FARINA, deceased,
Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Judgment in DiBiase v. Alitalia

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

(35)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#94

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Memorandum Opinion Denying Petition for Rehearing

(36)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

CONDON & FORSYTH, New York, N. Y., *for appellant.*

Motion denied.

J.E.L.
I.R.K.
U.S.C.J.J.

For the reasons stated in this petition and in my dissent herein, I would grant.

L.P.M.
U.S.C.J.

Feb. 6, 1967

Order Denying Petition for Rehearing

(37)

UNITED STATES COURT OF APPEALS

THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian of FRANK LISI, an infant under the age of 14 years,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

(and four other cases)

A petition for a rehearing having been filed herein by counsel for the appellant,

Order Denying Petition for Rehearing

(38)

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED FEBRUARY 6, 1967
A. DANIEL FUSARO, *Clerk*

(39)

Memorandum Opinion Denying Petition for Rehearing *in banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

CONDON & FORSYTH, New York, N. Y., *for appellant.*

All of the active judges concurring, except Judges Moore, Friendly and Hays, who vote to grant, the petition for rehearing in banc is denied.

/S/ J. EDWARD LUMBARD

6 February 1967

Order Denying Petition for Rehearing *in banc*

(40)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian of FRANK LISI, an infant under the age of 14 years,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

(and four other cases)

Order Denying Petition for Rehearing in banc

(41)

A petition for a rehearing containing a suggestion that the action be reheard having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED FEBRUARY 6, 1967
A. DANIEL FUSARO, *Clerk*

Order Granting Stay of Issuance of Mandate

(42)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOHN LISI, ETC., *et al.*,

Plaintiffs-Appellees,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

MOTION TO STAY ISSUANCE OF MANDATE

George N. Tompkins, Jr., Condon & Forsyth, New York, N. Y., for defendant-appellant.

Motion to stay issuance of mandate granted subject to provisions of Rule 28(c).

J.E.L.
L.P.M.
I.R.K.
U.S.C.J.J.

20 February 1967

Order Allowing Certiorari

SUPREME COURT OF THE UNITED STATES

No. 70, October Term, 1967

Alitalia-Linee Aeree Italiane, S.p.A.,

Petitioner,

—v.—

John Lisi, etc., *et al.*

Order Allowing Certiorari. Filed November 6, 1967.

The petition herein for a writ of certiorari to the United States Court of Appeal for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

MAR 20 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1165~~ 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cases on December 16, 1966.*

Citations to Opinions Below

The opinion of the District Court (R. 39a), printed in Appendix B,** p. 43, is reported in 253 F. Supp. 237. The opinion of the Circuit Court of Appeals (R. 64a), printed in Appendix B, p. 13, is reported in 370 F. 2d 508.

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* Additional respondents are Rocco Cologgi, Nicolina Como, Rosina DiBiase and Joseph Maiorano.

** Because of the voluminous appendix, it is separately presented. SUP. CT. R. 23.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on December 16, 1966. R. 76a-84a; Appendix B, pp. 26-35. Timely petitions for rehearing and rehearing *in banc* were denied on February 6, 1967. R. 113a-119a; Appendix B, pp. 36-41. A thirty day stay of the issuance of the mandate was granted by the Circuit Court of Appeals on February 20, 1967. R. 125a-127a; Appendix B, p. 42.

The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

Questions Presented

1. Does the Warsaw Convention, a Treaty of the United States,[1] require that actual notice of the legal limitation of an air carrier's liability for personal injury or death of a passenger, set forth in Article 22 thereof, be given to passengers before it becomes binding?

2. Does the sanction in Article 3(2) of the Warsaw Convention,[2] depriving an air carrier of the benefit of the Treaty defenses which exclude or limit its liability where no passenger ticket is delivered, likewise apply where the passenger ticket is delivered but fails to contain a readable notice that the Treaty limits the carrier's liability in the event of injury to or death of a passenger?

3. Does the statement in the baggage checks delivered by petitioner, as to the applicability of the liability rules

---

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. Adherence by the United States was declared June 27, 1934, and became effective October 29, 1934. 49 *Stat.* 3000; T.S. 876.

[2] Hereinafter reference will merely be to relevant Articles of the Convention.

of the Warsaw Convention, satisfy the mandatory requirements of Articles 4(3)(h) and 4(4)?

4. Should the question of the readability of the passenger ticket and baggage check be submitted to a jury?

Treaty Involved

The provisions of the Warsaw Convention involved are Articles 1, 3, 4, 8, 9, 20 and 22. The full text of these Articles in the official French and also in English, are printed in Appendix A, pages 1 to 12.

Statement

Respondents commenced five suits, which were consolidated in the District Court, to recover damages for wrongful death, personal injuries, and property damage allegedly sustained by thirteen passengers on petitioner's aircraft which crashed shortly after take-off from Shannon, Ireland on February 26, 1960. (R. 65a). The aircraft was en route from Rome to New York. (R. 65a). Respondents are citizens of the State of New York, and petitioner is an Italian corporation with its principal place of business in Rome, Italy. (R. 65a). Jurisdiction of the District Court is based upon diversity of citizenship, 28 *U.S.C.* §1332(a) (2).

Each of these passengers was traveling pursuant to a passenger ticket which provided for "international transportation" within the meaning of Article 1 of the Warsaw Convention. (R. 19a-25a). In answering the separate Complaints, petitioner pleaded several affirmative defenses based upon Articles 20 and 22 of the Treaty which serve to exclude or limit petitioner's liability for the damage alleged. (R. 4a-9a). Prior to trial, respondents moved for

partial summary judgment dismissing these affirmative defenses, asserting that petitioner had failed properly to notify the passengers of the applicability of the Treaty to their transportation, and that, therefore, the provisions of the Treaty excluding or limiting liability were unavailable. (R. 10a-18a). The District Court agreed with respondents and granted their motion. (R. 39a-49a). The opinion of the District Court included a certification that the decision involves a controlling question of law concerning which there is substantial ground for difference of opinion. (R. 48a-49a). Pending disposition of this question by the Circuit Court of Appeals, the trial on damages was stayed by the District Court. (R. 49a). Petitioner's application for leave to appeal pursuant to 28 U.S.C. §1292 (b) was granted by the Circuit Court of Appeals on April 14, 1966. (R. 66a).

By a vote of two to one, with a strong dissenting opinion by Judge Moore, the Circuit Court of Appeals affirmed the judgment of the District Court. A petition for rehearing by the original panel was denied by the same vote of two to one. (R. 113a-115a). Rehearing *in banc* was denied by a vote of six to three, Judges Moore, Friendly and Hays voting to grant. (R. 117a-119a).

Both in the District Court and in the Court of Appeals, respondents contended that the limitation of liability contained in the Warsaw Convention is not binding on a passenger unless he has been given prior actual notice that the Treaty limits the carrier's liability in the event of an accident. Respondents argued that this position is supported by Article 3(1) of the Convention, which lists as one of the particulars to be included in the passenger ticket a statement that the transportation is subject to the rules relating to liability established by the Convention. Finally, they contended that the passenger tickets delivered

by petitioner did not contain "adequate notice" because the statement in the tickets as to the applicability of the rules of the Convention was not definite, noticeable, readable and understandable to a layman.

Petitioner contended in the courts below that the Treaty does not require that notice of the Convention limits of liability be given before they become binding in the case of injury to or death of a passenger. Article 3(1) merely lists the particulars to be included in the passenger ticket. The Treaty does not impose any penalty or sanction upon the carrier if the passenger ticket omits any of these listed particulars. The only sanction in the Treaty relating to the passenger ticket is contained in Article 3(2), which deprives the carrier of the benefit of the provisions excluding or limiting liability *if the carrier accepts a passenger without a passenger ticket having been delivered.*

Petitioner urged that Article 3(1) must be read in conjunction with related Articles of the Treaty which deal with other transportation documents, that is, the baggage check and the air waybill. Article 4, dealing with the baggage check and Article 9, which deals with the air waybill, deprive the carrier of the benefit of the limitation of liability where no baggage check or air waybill is delivered, *or* if the document delivered fails to contain a statement that the transportation is subject to the liability rules of the Convention. There is no similar alternative provision in Article 3(2) which deals with the passenger ticket. Article 3(2) limits by its express words the imposition of the penalty to cases of non-delivery of a ticket.

Petitioner drew the attention of the Court below to the fact that the drafters of the Treaty had considered extending the penalty in Article 3(2) to cover the situation where the passenger ticket omitted any of the particulars listed

in Article 3(1). This would have rendered Article 3 uniform with Articles 4 and 9 in this regard. However, after consideration by the delegates to the Convention, this proposal was expressly rejected. Petitioner contended that, in any event, the passenger tickets and baggage checks delivered contained all of the particulars listed in Articles 3 and 4 of the Convention.

The majority of the Court below rejected a literal reading of the plain language of the Treaty, and at the same time wholly disregarded the unequivocal intent of the parties to the Treaty as clearly expressed in the "legislative history" thereof.

The majority decision of the Court below holds that the legal limitation of liability contained in the Warsaw Convention does not apply unless prior actual notice has been given to the passenger that the carrier's liability is limited by the Treaty. The decision further holds that the sanction in Article 3(2) applies not only where no passenger ticket is delivered, but also where the ticket delivered fails to contain one of the particulars listed in Article 3(1).

Finally, the majority of the Court below held that the tickets and baggage checks herein—the standard airline passenger tickets and baggage checks in daily use throughout the world for over 15 years—did not give adequate notice of the Treaty's limitations of liability because they were printed in type too small to be readable.

Reasons for Granting the Writ

1. The majority decision of the Court below has interpreted a Treaty of the United States, the supreme Law of the land,[3] in direct conflict with the plain language of the Treaty, the clear intent of the parties to the Treaty as shown in the "legislative history", the official position of the Executive Branch of the United States Government, and finally, in conflict with every reported authority which has ever considered the same point. This decision so defeats the scheme of the Warsaw Convention as to result in virtual denunciation of this Treaty, a step which the United States Government refused to take in May, 1966.[4]

As so accurately characterized by Judge Moore in his strong dissenting opinion:

> "The majority in their opinion indulge in judicial treaty-making.
>
> • • • • •
>
> "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability." (R. 74a).

The majority of the Court below have so far exceeded the permissible limits of treaty interpretation[5] as to re-

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[3] U.S. CONST. art. VI cl. 2.

[4] 32 J. AIR L. & COM. No. 2, p. 243 (1966).

[5] Delineated by decisions of this Court over many years. See, *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); *Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (1940); *Valentine* v. *United States*, 299 U.S. 5 (1936); *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933); *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931); *Nielsen* v. *Johnson*, 279 U.S. 47 (1929); *De Geofroy* v. *Riggs*, 133 U.S. 258 (1890).

quire the exercise by the Supreme Court of its supervisory powers, if the reputation of the United States for good faith, honor, and integrity in dealing with other nations is to be preserved.

(a) The language of the Warsaw Convention is clear on its face. The majority of the Court below, however, found the words of the Treaty to be a "'verbal prison'" and proceeded to interpret the Treaty in complete disregard of the plain language thereof. Again, in the words of Judge Moore:

> "Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem." (R. 74a).

Article 3(2) of the Convention, in plain, simple, concise language, imposes upon a carrier the severe and unusual penalty of absolute liability for personal injury or death of its passengers, and without limitation as to damages, "if the carrier accepts a passenger without a passenger ticket having been delivered." 49 *Stat.* 3015. This is the only circumstance listed in Article 3(2) justifying the imposition of this penalty. Nevertheless, the majority of the Court below have held that the penalty in Article 3(2) applies not only in cases of non-delivery, but also where the ticket delivered does not contain a noticeable and readable statement that the transportation is subject to the liability rules of the Convention.

This holding is in direct conflict with the intent of the parties to the Treaty, as clearly expressed in Article 3, and the corollary Articles 4, 8 and 9. Article 3(1) lists the particulars to be included in the passenger ticket. One of these is a statement that the transportation is subject to the liability rules established by the Conven-

tion. Article 3(1)(e), 49 *Stat.* 3015. With respect to the transportation of baggage and cargo, Articles 4(3)(h) and 8(q) specify the identical statement as one of the particulars to be included in the baggage check and air waybill, respectively. 49 *Stat.* 3015, 3016.

If the carrier "accepts a passenger without a passenger ticket having been delivered," the carrier cannot avail itself of the provisions of the Convention excluding or limiting liability. Article 3(2), 49 *Stat.* 3015. Similarly, if no baggage check is delivered, or if no air waybill is made out, the carrier cannot avail itself of the provisions of the Convention excluding or limiting liability for baggage or cargo losses. Article 4(4), 49 *Stat.* 3015; Article 9, 49 *Stat.* 3017. There the similarity between the requirements for the passenger ticket and the baggage and cargo documents ends.

For, while Articles 3(2), 4(4) and 9 all impose the sanction of absolute unlimited liability in cases of non-delivery, Articles 4(4) and 9 *in addition* expressly impose the sanction *if the baggage check and air waybill fail to contain any of the particulars required, one of which is a statement that the transportation is subject to the liability rules of the Convention.* But in the case of the passenger ticket, Article 3(2) lists only the case of non-delivery as the basis for the imposition of this sanction.

This very important distinction between the scope of the sanctions in Articles 3(2), 4(4) and 9 was recognized in *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). There the District Court held that the mere omission of one of the particulars listed in Article 3(1) from the passenger ticket did not render the penalty of Article 3(2) for non-delivery applicable. The District Court relied heavily on the clear intent of

the parties to the Treaty as expressed in the contrasting sanctions in Articles 3(2), 4(4) and 9. The Court of Appeals affirmed upon the basis of the opinion of the District Court.

Now, the majority decision of the Court below, without overruling *Grey* but by characterizing petitioner's reliance thereon as "misplaced", holds that the failure to include one of the particulars listed in Article 3(1) in the passenger ticket in readable type renders the non-delivery penalty of Article 3(2) applicable.

(b) Examination of the history of the drafting of Article 3 of the Warsaw Convention confirms in unmistakable terms that the sanction in Article 3(2) does not apply merely because the passenger ticket omits any of the particulars listed in Article 3(1). Petitioner urged the Court to examine this history, yet the decision of the majority makes no reference thereto.

The preliminary draft of Article 3 prepared by CITEJA[6] in 1928, contained the following sanction:

> "If, for an international journey, the carrier accepts a passenger without having delivered a passenger ticket, *or if the ticket does not contain the particulars indicated above,* the contract of transportation will none the less be subject to the rules of this Convention, but the carrier will not be entitled to avail himself of those provisions of this Convention which exclude in whole or in part his liability direct or derived from the omissions of his agents."[7]

The drafting committee at the Warsaw Conference decided, however, that the words, *"or if the ticket does not*

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[6] Comité International Technique d'Experts Juridiques Aériens.

[7] II^ème^ Conference Internationale de Droit Prive Aerien, ICAO Doc. 7838, p. 168 (1930). (Translation and emphasis ours.)

contain the particulars indicated above", be deleted. The following excerpts from the Minutes of the Conference clearly demonstrate the intent of the drafters:

> "M. de Vos, Reporter. Gentlemen, Article 3 relates to the passenger ticket and what should be found on the ticket.
>
> • • • • •
>
> "But because of the observation by the Greek delegate, which is the following: the last line of this Article imposes the sanctions in case of the absence of the passenger ticket *or if the passenger ticket does not contain all the particulars indicated,* thus the sanction becomes too severe if it operates upon a simple omission or on the carelessness of an airline employee—the committee came to agreement on this point of view, and in the last paragraph, it took out the words:
>
> *'or if the ticket does not contain the particulars indicated above.'*
>
> • • • • •
>
> "M. Gianini (Italy)—I would like to have the Reporter give us the Article as it now reads.
>
> "M. de Vos. It is the same text as that in the draft . . . with the elimination in the last paragraph of the words, *'or if the ticket does not contain the particulars indicated above'*." [8]

As finally adopted by the delegates, therefore, the sanction in Article 3(2) is expressly limited to the situation where no passenger ticket is deliverd. IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, p. 129 (1930).

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[8] IIème Conference Internationale de Droit Prive Aerien, ICAO Doc. 7838, pp. 100-101 (1930). (Translation and emphasis ours.)

The intent of the parties to the Treaty that the imposition of this sanction should be so limited, could hardly be clearer. Yet, by judicial decision, the majority of the Court below have accomplished what was expressly considered and flatly rejected by the parties before final adoption of the Treaty. The majority, to find support for their decision, turn to the spirit of inapplicable cases[9] rather than to the clear intent of the parties to the Treaty, expressed not only in the plain language of the Treaty itself, but also in the "legislative history" of the Treaty.

(c) The majority of the Court below have adopted a position diametrically opposed to the position of the Government of the United States that the Warsaw Convention does not require "notice" in the passenger ticket of the applicability of the Treaty limits of liability. At the Hague Conference in 1955, the United States proposed an amendment to Article 3(2) to extend the present sanction to cover situations where the passenger ticket fails to notify the passenger that the Treaty limits the carrier's liability for personal injury or death. The United States strongly urged this amendment. Extensive debate ensued, during the course of which the delegates to the Conference repeatedly recognized that the Warsaw Convention does not require any such notice in the passenger ticket, and that the sanction in Article 3(2) does not apply where the passenger ticket fails to make reference to the applicability of the Warsaw Convention.[10] The other nations

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[9] *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); *Warren* v. *The Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965). Both of these cases dealt with the timeliness of the ticket delivery, and whether the carrier had accepted a passenger without a passenger ticket having been delivered, within the meaning of Article 3(2). Neither case dealt with the point here in issue. Nevertheless, the majority rely, "quite illogically" in the opinion of Judge Moore, on these cases to support their position.

[10] I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686—LC/140 pp. 65-91 (1955).

at the Hague ultimately agreed to adopt the amendment to Article 3(2) proposed by the United States. This amendment as adopted reads:

> "2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph 1(c) of this Article,* the carrier shall not be entitled to avail himself of the provisions of Article 22." I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 134 (1955). (Emphasis added.)

The United States has never ratified the Hague Protocol, nor does it appear probable that it ever will. Therefore, the effect of this decision is not shortly to be nullified by Treaty amendment. See, S. EXEC. DOC. H, 86th Cong. 1st Sess. (1959); S. EXEC. REPT. No. 3, 89th Cong. 1st Sess. (1965); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497, 504-516, 532-546 (1967).

If the decision of the majority of the Court below is to be representative of the present position of the United States, then the Executive Branch of the Government will be placed in the position of having sought a wholly unnecessary amendment to Article 3(2) in 1955.

(d) The majority decision of the Court below is in direct conflict with every authority which has ever considered the adequacy of the statement as to the applicability of

the Warsaw Convention contained in all of the standard airline transportation documents, whether it be the passenger ticket, baggage check, or air waybill. Furthermore, the decision is in direct conflict with every authority on the question of whether the penalty of absolute unlimited liability applies where the passenger ticket fails to contain any of the particulars listed in Article 3(1). See, *Seth* v. *British Overseas Airways Corporation*, 329 F. 2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964); *Grey* v. *American Airlines, Inc.*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956), *affirming* 95 F. Supp. 756 (S.D.N.Y. 1950); *Eck* v. *United Arab Airlines, Inc.*, 20 A.D. 2d 454 (1st Dep't 1964), *rev'd on other grounds*, 15 N.Y. 2d 53 (1964); *Manufacturers Hanover Trust Co.* v. *American Airlines, Inc.*, 23 A.D. 2d 832 (1st Dep't. 1965); *Samuel Montague & Co.* v. *Swiss Air Transport Co.* [1966], 1 Lloyd's Rep. 323; *Preston* v. *Hunting Air Transport, Ltd.*, 1956 U.S. Av. R. 1 (Q.B.D. 1956); DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL LAW ¶251 (1954); SHAWCROSS AND BEAUMONT, AIR LAW ¶406 (2nd ed. 1951); GOEDHUIS, NATIONAL AIRLEGISLATION AND THE WARSAW CONVENTION 156-7 (1937).

All the foregoing authorities have given recognition and effect to the very keynote of the Warsaw Convention, which is uniformity throughout the world. Against this wall of uniform authority, the decision of the majority of the Court below now stands alone.

2. The good faith and integrity of the United States in its relations with other nations have been compromised by the majority decision of the Court below. There are some ninety nations which are parties to the Warsaw Convention.[11] What reliance can these other nations place upon

[11] U.S. DEPT. OF STATE, PUB. NO. 8188, *Treaties in Force* 235 (1967).

the international commitments undertaken by the Government of the United States if the Courts of the United States are at liberty to effectively nullify the clear intent of the parties to the treaty by "judicial fiat"? This is the basic consideration underlying the questions presented herein, and a final resolution of these questions by the Supreme Court is necessary.

Some international repercussions have already resulted from the decision of the Court below. More serious ones can certainly be expected. The Government of the United Kingdom have under consideration the question whether they should withdraw altogether from the Warsaw Convention in order to protect themselves from the devastating results of this decision. The United Kingdom, at least, is clearly not prepared to expose its carriers to unlimited liability without fault.

On February 7, 1967, a Member of Parliament raised these questions in the House of Commons:

> "If the [*Lisi*] decision is unreversed, will the Government give consideration even to withdrawal from the Warsaw Convention on these grounds? What steps are being taken to reverse the effect of this decision?" [12]

On behalf of the Government, the Minister of State, Board of Trade, Mr. J. P. W. Mallalieu, replied:

> "This Lisi case is being watched by the British Government and the experts of the International Civil Aviation Organisation are watching it with the greatest care. Depending on what the final decision is, we shall have to decide then what action we can take. I am

[12] HOUSE OF COMMONS: 740 OFFICIAL REPORT 139 (8 Feb. 67), Col. 1576. The full text of these Parliamentary proceedings is printed in Appendix C, commencing page 54.

grateful to hon. Members for raising this matter which is clearly of great importance."[13]

3. The majority decision of the Court below, in holding that the standard airline passenger ticket and baggage check[14] do not meet the requirements of the Warsaw Convention, is in direct conflict with the holding of the First Circuit in *Seth* v. *British Overseas Airways Corporation*, 329 F.2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964). In the *Seth* case the challenge was made against the statement in the passenger ticket and baggage check referring to the applicability of the rules of the Warsaw Convention, upon the basis of the mandatory requirements of Article 4 as to the contents of the baggage check.[15] The passenger ticket and baggage check involved in *Seth* was identical to the documents involved herein.[16]

The Court of Appeals for the First Circuit held that the statement contained in the standard IATA passenger ticket and baggage check, referring to the applicability of the rules of the Warsaw Convention to the transportation, complied with the mandatory requirements of Article 4.

The majority of the Court below, however, have held that the same document does not comply with what the majority conceive to be a mandatory requirement in Article

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[13] HOUSE OF COMMONS: 740 OFFICIAL REPORT 139 (8 Feb. 67), Col. 1591.

[14] In use by all members of the International Air Transport Association (IATA) and approved as to form and content by the Civil Aeronautics Board in 1957. *Pan American World Airways, Inc., et al., Conditions of Carriage and Related Traffic Regulations*, 24 C.A.B. 575 (1957).

[15] The standard passenger ticket and baggage check are one and the same document.

[16] *Seth* v. *British Overseas Airways Corporation*, 329 F. 2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964), Record Appendix to Brief of Appellant BOAC, pp. 13 and 16.

3 dealing with the passenger ticket, and also fails to satisfy the mandatory requirements of Article 4 as to the contents of the baggage check. The majority decision holds that the passenger ticket and baggage check are inadequate because the type used is too small to be either noticeable or readable. In so holding, the majority of the Court below have placed the Second Circuit in direct conflict with the First Circuit on the legal sufficiency of the same document under the Treaty.

4. In holding that, as a matter of law, the standard airline passenger ticket and baggage check are unreadable, the majority of the Court below have deprived petitioner of a jury trial on this issue in violation of the Seventh Amendment to the United States Constitution. U.S. CONST. amend. VII. Surely the question of print readability should be decided by a jury. See, *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962). As recognized by Judge Moore in his dissenting opinion:

> "Furthermore, for the courts to say that a jury could not reasonably have found that the ticket gave the passenger the required notice is, upon a motion for partial summary judgment, to usurp the time-honored function of the jury." (R. 75a).

5. Petitioner is informed that the International Air Transport Association (IATA) and the Air Transport Association of America (ATA) are seeking leave to intervene and file briefs as *amici curiae* in support of this petition. IATA is the Association of the world's principal scheduled air carriers. ATA is the Association of the principal scheduled air carriers of the United States. Both of these Associations will urge that this petition be

granted in view of the tremendous and far-reaching impact of this decision on the airline industry at large. Petitioner adopts the arguments and reasons advanced by both of these Associations as additional reasons for the granting of this petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

AUSTIN P. MAGNER,
GEORGE N. TOMPKINS, JR.,
Counsel for Petitioner.

ROBERT P. GORMAN,
JOHN H. MONTGOMERY, JR.,
WILLIAM L. SCHIERBERL,
of Counsel.

March 20, 1967

Certificate of Service

I hereby certify that I have, this 20th day of March, 1967, served the foregoing petition for a writ of certiorari upon respondents by depositing same in a United States mail box at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid, addressed to Theodore E. Wolcott, counsel of record for respondents, at his post office address, 36 West 44th Street, New York, New York 10036.

March 20, 1967

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1169~~ 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUSTIN R. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

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APPENDIX A

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. 49 *Stat.* 3000, *et seq.*; T. S. 876.

Article Premier.

(1) La présente Convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par áeronef contre rémunération. Elle s'applique également aux transports gratuits effectués par áeronef par une entreprise de transports áeriens.

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) Est qualifié "transport international", au sens de la présente Convention, tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes, soit sur le territoire d'une seule Haute Partie Contractante, si une escale est prévue dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une autre Puissance même non Contractante. Le transport sans une telle escale entre les territoires soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité de la même Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Le transport à exécuter par plusieurs transporteurs par air successifs est censé constituer pour l'application de cette Convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une même Haute Partie Contractante. 49 *Stat.* 3001.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has

been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party. 49 *Stat.* 3014.

Article 3.

(1) Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) le nom et l'adresse du ou des transporteurs;

e) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence, ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte le voyageur sans qu'il ait été délivré un billet de passage, il n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité. 49 *Stat.* 3001.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability. 49 *Stat.* 3015.

Article 4.

(1) Dans le transport de bagages, autres que les menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.

Appendix A
Warsaw Convention Rules

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur.

(3) Il doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) le nom et l'adresse du ou des transporteurs;

d) le numéro du billet de passage;

e) l'indication que la livraison des bagages est faite au porteur du bulletin;

f) le nombre et le poids des colis;

g) le montant de la valeur déclarée conformément à l'article 22 alinéa 2;

h) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22 (2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) L'absence, l'irregularité ou la perte du bulletin n'affecte ni l'existence, ni la validité du contrat de transport que n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres d), f), h), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité. 49 *Stat.* 3002.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability. 49 *Stat.* 3015.

Appendix A
Warsaw Convention Rules

Article 8.

La lettre de transport áerien doit contenir les mentions suivantes:

a) le lieu où le document a été crée et la date à laquelle il a été établi;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) le nom et l'adresse de l'expéditeur;

e) le nom et l'adresse du premier transporteur;

f) le nom et l'adresse du destinataire, s'il y a lieu;

g) la nature de la marchandise;

h) le nombre, le mode d'emballage, les marques particulières ou les numéros des colis;

i) le poids, la quantité, le volume ou les dimensions de la marchandise;

j) l'état apparent de la marchandise et de l'emballage;

k) le prix du transport s'il est stipulé, la date et le lieu de paiement et la personne qui doit payer;

l) si l'envoi est fait contre remboursement, le prix des marchandises et, éventuellement, le montant des frais;

m) le montant de la valeur déclarée conformément à l'article 22, alinéa 2;

n) le nombre d'exemplaires de la lettre de transport áerien;

o) les documents transmis au transporteur pour accompagner la lettre de transport aérien;

p) le délai de transport et indication sommaire de la voie à suivre (*via*) s'ils ont été stipulés;

q) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention. 49 *Stat.* 3003.

Article 8

The air waybill shall contain the following particulars:

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the consignor;

(e) The name and address of the first carrier;

(f) The name and address of the consignee, if the case so requires;

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or numbers upon them;

(i) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods; and, if the case so requires, the amount of the expenses incurred;

(m) The amount of the value declared in accordance with article 22(2);

(n) The number of parts of the air waybill;

(o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention. 49 *Stat.* 3016.

Article 9.

Si le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport aérien, ou si celle-ci ne contient pas toutes les mentions indiquées par l'article 8 [a) à i) inclusivement et q)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité. 49 *Stat.* 3003.

Article 9.

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (a) to (i), inclusive,

and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability. 49 *Stat.* 3019.

Article 20.

(1) Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre. 49 *Stat.* 3005.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. 49 *Stat.* 3019.

Article 22.

(1) Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs. Dans le cas où, d'après la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus elevée.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the

equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) Dans le transport de bagages enregistrés et de marchandises, la responsabilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) En ce qui concerne les objets dont de voyaguer conserve la garde, la responsabilité du transporteur est limitée à cinq mille francs par voyageur.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) Les sommes indiquées ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq et demie milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds. 49 *Stat.* 3006.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures. 49 *Stat.* 3019.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 91-95—September Term, 1966.

(Argued October 26, 1966 Decided December 16, 1966.)

Docket Nos. 30543-4-5-6-7

JOHN LISI, etc., *et al.*,

Appellees,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and KAUFMAN, *Circuit Judges.*

Appeal, pursant to 28 U. S. C. §1292(b), from a partial summary judgment, MacMahon, *J.*, United States District Court for the Southern District of New York, dismissing appellant's affirmative defenses based on the Warsaw Convention, 49 Stat. 3000, et seq.

Judgment affirmed.

GEORGE N. TOMPKINS, JR., New York, N. Y. (Austin P. Magner, Condon & Forsyth, New York, N. Y., on the brief), *for appellant.*

Appendix B
Opinion by Kaufman, C.J.

THEODORE E. WOLCOTT, New York, N. Y. (Alfred W. Gans, New York, N. Y., on the brief), *for appellees.*

KAUFMAN, *Circuit Judge:*

The question presented on this appeal is whether Alitalia's liability, arising from the crash of one of its planes, is limited by the provisions of the so-called Warsaw Convention.[1]

On February 26, 1960, while en route from Rome to New York, Alitalia's airplane crashed shortly after taking off from Shannon, Ireland. Five suits were brought and consolidated in the District Court for wrongful death, personal injuries and property damage, allegedly suffered by thirteen of the passengers aboard the craft at the time of the disaster. The appellees are citizens of New York, while appellant is an Italian corporation. Jurisdiction is based on diversity of citizenship, 28 U. S. C. §1332(a)(2).

In answering the complaints, Alitalia pleaded as affirmative defenses those Articles of the Convention which serve to exclude or limit an airline's liability to its passengers. Prior to trial, the appellees moved for a partial summary judgment to dismiss these affirmative defenses, asserting that they were not available because appellant had failed properly to notify the passengers of the applicability of the Convention. Judge MacMahon agreed with appellees and

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[1] 49 Stat. 3000-26. The official title is "Convention for the Unification of Certain Rules Relating to International Transportation by Air," hereinafter referred to as "Convention."

The Convention was concluded at Warsaw, Poland, on October 12, 1929, and proclaimed by President Roosevelt on October 29, 1934. Over ninety countries have become signatories to the Convention.

granted their motion. He also stayed the trial pending decision by us "on the controlling question of whether the challenged affirmative defenses are available to defendant [Alitalia] in the light of the facts shown here." 253 F. Supp. 237, 243 (S. D. N. Y. 1966). This Court granted appellant's application for leave to appeal pursuant to 28 U. S. C. §1292(b).[2]

I.

It is conceded that the flight in question meets the definition of "international transportation" contained in Article 1 of the Convention.[3] Therefore, the provisions of the Convention quite properly govern the present action. See *Eck* v. *United Arab Airlines*, 360 F. 2d 804, 808 (2d Cir. 1966).

Alitalia's main argument can be stated quite simply. Under Articles 17 and 18 of the Convention, 49 Stat. 3018-

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[2] "(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[3] "(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. . . .

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated within the territories of two High Contracting Parties. . . ." 49 Stat. 3014.

19, the carrier is liable for the death or bodily injuries suffered by passengers while on board its aircraft, and for destruction or loss of checked baggage. But, this liability, it says, is limited by Article 22, 49 Stat. 3019, which provides:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [approximately $8300] . . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.[4]
>
> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs [approximately $17] per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. . . .
>
> (3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs [approximately $332] per passenger.

It is clear, however, that under other Articles of the Convention, these limitations on liability are not applicable if the carrier fails to deliver to the passenger a ticket or

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[4] Prior to the Hague Protocol of 1955 (see note 7, *infra*), the carrier was not liable even for this limited amount "if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures," Article 20, 49 Stat. 3019; or if "the carrier proves that the damage was caused or contributed to by negligence of the injured person [and] the court . . . in accordance with the provisions of its own law, exonerates the carrier wholly or partly from his liability." Article 21, 49 Stat. 3019.

a check for baggage.[5] These Articles, moreover, provide that the ticket and check shall contain certain specified information, including "a statement that the transportation is subject to the rules relating to liability established by this convention."[6] Thus, it would appear, that unless the carrier furnishes to the passenger a ticket or baggage check containing the appropriate statement, it may not restrict its liability as circumscribed by the Convention Articles.

Alitalia responds, however, by arguing that there is a crucial difference in the language between Articles 3 and 4. While Article 4(4), it says, denies the carrier limited liability "if . . . [it] accepts baggage without a baggage check having been delivered, *or if the baggage check does not contain the particulars*" specified (emphasis added), the only ground stated in Article 3(2) for denying limited liability for the personal injuries or death of passengers, is the carrier's failure to deliver a ticket. Thus, we are asked to apply the principle *expressio unius est exclusio alterius* and to hold that failure to give notice on the passenger ticket that the flight is subject to the Convention's rules, will not deprive the carrier of the substantial delimitation of liability for personal injuries or death. All that is required, urges Alitalia, for this right to vest, is that a ticket be delivered to the passengers.

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[5] "[I]f the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." Article 3(2), 49 Stat. 3015.

"[I]f the carrier accepts baggage without a baggage check having been delivered . . . the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability." Article 4(4), 49 Stat. 3016.

[6] Article 3(1)(e), 49 Stat. 3015; Article 4(3)(h), 49 Stat. 3016.

Appendix B
Opinion by Kaufman, C.J.

II.

It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Franfurter stated it, a "verbal prison." *Sullivan* v. *Behimer*, 363 U. S. 335, 358 (1960) (Frankfurter, *J.*, dissenting). The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, "words are such temperamental beings that the surest way to lose their essence is to take them at their face." 1942 Address by Judge Hand to the Massachusetts Bar Association. Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra.*

This is not the first occasion on which we have been called upon to interpret the language of the Convention's delimiting provisions. For example, in *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir.), *cert. denied*, 382 U. S. 816 (1965), we were asked to decide whether presenting a ticket to a passenger after he boarded the carrier's plane, constituted a "delivery" within the meaning of Article 3(2). We stated:

> We read Article 3(2) to require that the *ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability.* Such self-protective measures, could consist of for example, deciding not to take the flight, entering in a special

contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that "the carrier and the passenger may agree to a higher limit of liability," (Article 22(1)) and there would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket *be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.*" *Id.* at 856-57 (emphasis added).

We held, accordingly, that the delivery was inadequate, and the Convention's fixed limits of liability were not available.

Later, a similar result was reached by the Ninth Circuit in *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494 (1965). There the passenger was given a "boarding ticket" or "pass" at the foot of the ramp leading to the aircraft. The Court decided that the "delivery" must be made sufficiently in advance so that the passenger will have the opportunity to take self-protective measures, such as purchasing additional insurance if he so chooses. The "delivery" of a boarding ticket at the foot of the ramp as the plane was about to depart, did not suffice therefore. The carrier, accordingly, was barred by Article 3(2) from availing itself of the Convention's liability limitation provisions.

We believe that the reasoning of the *Mertens* and *Warren* decisions is apposite to the case now before us. The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized[7]—are advantageous to

the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled domestically, the amount they may

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[7] See generally Sand, "Air Carriers' Limitations of Liability and Air Passengers' Accident Compensation Under the Warsaw Convention," 28 *J. Air L. & Com.* 260 (1961-62).

Criticism of the Convention's limits on liability began to crystallize in the early 1950's as a result of the impact on the public arising from a plane crash in 1943, in which the entertainer Jane Froman was seriously injured. Despite the extent of her injuries, the size of her medical bills, and the curtailment of her blossoming career, her award against Pan American was limited to $8300. *Ross* v. *Pan American Airways*, 299 N. Y. 88 (1949), *cert. denied, sub nom. Froman* v. *Pan American Airways, Inc.*, 349 U. S. 947 (1955). See Kreindler, "The Denunciation of the Warsaw Convention," 31 *J. Air L. & Com.* 291, 294 (1965).

In 1955, the Hague Conference was called, and from it came the so-called Hague Protocol, which would have doubled the limits on liability for personal injuries to $16,600. Although signed by the United States, it was not ratified by the Senate.

On November 15, 1965, the United States sent a Notice of Denunciation to the Polish Government stating that this country opposed the Convention's low limits on liability for personal injuries, and would withdraw from the Convention at the end of six months, pursuant to Article 39, 49 Stat. 3022. *Id.* at 303. The State Department made it

recover in the event of an accident is drastically reduced. In short, it is clear from the *ratio decidendi* of the *Mertens* and *Warren* cases, that the inquiry that must be made if the Convention's Articles are to be given meaning, is "whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures . . . ." *Mertens* v. *Flying Tiger Line, Inc., supra* at 857.[8]

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known, however, that the denunciation would be withdrawn if the world's international air carriers agreed to raise the limitation first to $75,000 and ultimately to $100,000. An interim agreement was reached among the carriers, including Alitalia, in the Spring of 1966, providing for limits of liability of $58,000 plus costs of litigation, or $75,000 inclusive of costs of litigation, under conditions of absolute liability. On May 14, 1966, the United States withdrew its previous "Notice of Denunciation." See "The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation," 32 *J. Air L. & Com.*, No. 2, p. 243 (1966).

[8] Alitalia's reliance on *Grey* v. *American Airlines*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956), is misplaced. In that case defendant's plane, while en route from New York to Mexico City, crashed near Dallas. Although the flight was scheduled to make stops at Washington, D. C. and Dallas, this information was not contained on the ticket given to the plaintiffs, despite the provision in Article 3 of the Convention that all "agreed stopping places" shall be listed. Plaintiffs claimed that because of this omission, defendant was precluded from claiming limited liability under the Convention. Plaintiffs' motion to strike the carrier's defenses based on the Convention was denied by the district court, 95 F. Supp. 756 (S. D. N. Y. 1950), and we affirmed, finding that the motion was based on a "technical and wholly unsubstantial alleged omission." 227 F. 2d at 284.

Our decision in *Grey* is perfectly consistent with the holdings in *Mertens* and *Warren, supra*. In *Grey*, the plaintiffs boarded the plane in New York and were headed for Mexico City. The fact that the ticket failed to list the intermediate stops in Washington, D. C. and Dallas, in no way deprived them of "a reasonable opportunity to take self-protective measures," since those stops did not change the "international" character of the flight so far as plaintiffs were concerned. See Article 1. Therefore, "delivery" of the ticket had taken place, and the defendant was entitled to avail itself of the Convention's limits on liability.

III.

We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice.[9] On the front of the ticket and baggage check, in exceedingly small print, was the following message: "Each passenger should carefully examine this ticket, particularly the Conditions on page 4." And, at this point, we note that one of our reasons in *Mertens* v. *Flying Tiger Line, Inc., supra,* for precluding the carrier from limiting its liability under the Convention was that the required statement on the ticket "was printed in such a manner as to virtually be unnoticeable and unreadable . . . ." *Id.* at 857.

Judge MacMahon appropriately characterized the "notice" to the passengers in his pithy conclusion as "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'. . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that their presence is concealed."[10] 253

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[9] The parties have agreed that this is a question of law for the court to resolve. A replica of the ticket may be found in the district court's opinion, 253 F. Supp. at 240-42.

[10] Moreover, even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon. For example, the passenger is referred to the carrier's tariffs in order to determine whether his flight is considered "international carriage"; and the carrier's liability is expressed in terms of "French gold francs (consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths)."

In 1963, the Civil Aeronautics Board took cognizance of the difficulty that the average passenger would have interpreting this language and issued what is now 14 C. F. R. §221.175, which provides in part:

> (a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself

F. Supp. at 243. Accord, *Warren* v. *Flying Tiger Line, Inc.*, *supra* at 497. But see *Seth* v. *British Overseas Airways*

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of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on
Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $8,290 and limits liability for loss or damage to baggage.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statements shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) on the ticket envelope.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section. Such statement shall be printed in bold face type at least one fourth of an inch high.

Corp., 329 F. 2d 302 (1st Cir.), *cert. denied*, 379 U. S. 858 (1964).

We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant.

Affirmed.

MOORE, *Circuit Judge* (dissenting):

The majority in their opinion indulge in judicial treaty-making. The language of the treaty (referred to as the Warsaw Convention) is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem.

Passenger tickets were delivered to plaintiffs and their decedents on various dates between January 20, 1960 and February 20, 1960. The flight on which they travelled pursuant to their tickets did not depart until February 25, 1960. The ticket contained the particulars specified in Article 3(1) of the Convention, albeit the reference to the provisions of the Convention with respect to death or injury was in exceedingly small type.

The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a "one-sided advantage" is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability. To support their argument they refer, quite illogically in my opinion, to cases in which the courts have held that there was no real delivery of a ticket to the passenger as contemplated by the treaty.

Appendix B
Dissenting Opinion by Moore, J.

Cases based upon facts tantamount to no effective pre-flight ticket delivery,[1] are scarcely relevant to this case where the passengers had their tickets from 3 to 36 days before departure. Were actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both understood and agreed to the limitation.

The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts. Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice. Furthermore, for the courts to say that a jury could not reasonably have found that the ticket gave the passenger the required notice is, upon a motion for partial summary judgment, to usurp the time-honored function of the jury.

For these reasons, I would reverse.

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[1] *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2 Cir. 1965) (Military officer already on board an aircraft about to take off when ticket delivered); *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494 (9 Cir. 1965) (Soldiers handed boarding tickets at foot of ramp leading to plane about to take off); *Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804 (2 Cir. 1966) (Warsaw Convention involved only on question of jurisdiction and venue).

Appendix B

Judgment in *Lisi* v. *Alitalia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian FRANK LISI, an infant under the age of 14 years,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B
Judgment in Lisi v. Alitalia

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#91

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Appendix B

Judgment in *Maiorano* v. *Alitalia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOSEPH MAIORANO,
Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix B
Judgment in Maiorano v. Alitalia

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#92

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO *Clerk*

Appendix B

Judgment in *Como* v. *Alitalia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

NICOLINA COMO, as Guardian *ad Litem* of NICOLAS DISCLAFANI, MARIA DISCLAFANI and GIUSEPPE DISCLAFANI, and as Administratrix of the Estate of CATERINA DISCLAFANI, deceased and ALFREDO DISCLAFANI, deceased,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B
Judgment in Como v. Alitalia

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Appendix B

Judgment in *Cologgi* v. *Alitalia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

ROCCO COLOGGI, Individually, and as Administrator of the Estate of ROSE COLOGGI, deceased and of BARBARA COLOGGI, deceased,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix B
Judgment in Cologgi v. Alitalia

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#94

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Appendix B

Judgment in *DiBiase* v. *Alitalia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

ROSINA DIBIASE, Individually, and as Administratrix of the Estate of NOTTE FARINA, deceased,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix B
Judgment in DiBiase v. Alitalia

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#95

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Appendix B

Memorandum Opinion Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

CONDON & FORSYTH, New York, N. Y., *for appellant.*

Motion denied.

J.E.L.
I.R.K.
U.S.C.JJ.

For the reasons stated in this petition and in my dissent herein, I would grant.

L.P.M.
U.S.C.J.

Feb. 6, 1967

Appendix B

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian of FRANK LISI, an infant under the age of 14 years,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

(and four other cases)

A petition for a rehearing having been filed herein by counsel for the appellant,

Appendix B
Order Denying Petition for Rehearing

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED FEBRUARY 6, 1967
A. DANIEL FUSARO, *Clerk*

Appendix B

Memorandum Opinion Denying Petition for Rehearing *in banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE].

CONDON & FORSYTH, New York, N. Y., *for appellant.*

All of the active judges concurring, except Judges Moore, Friendly and Hays, who vote to grant, the petition for rehearing in banc is denied.

/s/ J. EDWARD LUMBARD

6 February 1967

Appendix B

Order Denying Petition for Rehearing *in banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian of FRANK LISI, an infant under the age of 14 years,
Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Defendant-Appellant.

(and four other cases)

Appendix B

Order Denying Petition for Rehearing in banc

A petition for a rehearing containing a suggestion that the action be reheard having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED FEBRUARY 6, 1967
A. DANIEL FUSARO, *Clerk*

Appendix B

Order Granting Stay of Issuance of Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOHN LISI, ETC., *et al.*,

Plaintiffs-Appellees,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

MOTION TO STAY ISSUANCE OF MANDATE

George N. Tompkins, Jr., Condon & Forsyth, New York, N. Y., for defendant-appellant.

Motion to stay issuance of mandate granted subject to provisions of Rule 28(c).

J.E.L.
L.P.M.
I.R.K.
U.S.C.JJ.

20 February 1967

Appendix B

Opinion by MacMahon, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 4365

and consolidated cases

[SAME TITLE]

APPEARANCES:

THEODORE E. WOLCOTT, Esq.
New York, N. Y.
Attorney for Plaintiffs

CONDON & FORSYTH, Esqs.
New York, N. Y.
(GEORGE N. TOMPKINS, JR., Esq.,
New York, N. Y., of counsel)
Attorneys for Defendant

MACMAHON, *District Judge*

These are consolidated actions for death, personal injuries or property damage suffered by passengers in a crash of defendant's airplane on February 26, 1960, in Shannon, Ireland, while en route from Rome to New York. Plaintiffs are residents and citizens of New York, and defendant is an Italian corporation. Jurisdiction is based on diversity.

Plaintiffs move for partial summary judgment dismissing all affirmative defenses which are based on the exclusion or limitation of liability provisions (Articles 20

and 22) of the Warsaw Convention,[1] 49 Stat. 3000 (1934). All of the evidentiary facts material to the motion appear on the face of the tickets issued to the passengers on the flight involved, and there is no dispute about them.[2] Plaintiffs claim that these exculpatory defenses are not available to an airline unless the airline delivers a passenger ticket and, where applicable, a baggage check, which no-

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[1] The official title is "Convention for the Unification of Certain Rules Relating to International Transportation by Air." With but a single reservation immaterial here, adherence was advised June 15, 1934; declared June 27, 1934; and proclaimed October 29, 1934. See 49 Stat. 3000 et seq. (1934).

Article 20(1) provides:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Article 22 provides:

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [$8,300]. . . .

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger."

On November 15, 1965, the United States formally denounced the Warsaw Convention, effective May 15, 1966, unless the airlines serving the United States agree to raise the limitation on liability to $75,000, and ultimately to $100,000. See Kreindler, The Denunciation of the Warsaw Convention, 31 J. Air L. & Com. 291 (1965). Such denunciation does not affect these actions.

[2] The parties have submitted affidavits complying with Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York.

tify the passenger that the exclusion or limitation of liability provisions of the Warsaw Convention are applicable to the flight, and that the tickets and checks delivered here did not notify the passengers of such provisions. Defendant claims that if a ticket and check are delivered to a passenger before departure, such defenses are automatically applicable to flights between nations adhering to the Convention even though the ticket and check do not notify the passenger of such provisions, and that, in any event, the tickets and checks delivered here so notified the passengers.

[1] The Warsaw Convention specifies that the provisions of the Convention which exclude or limit an airline's liability are unavailable unless the airline delivers a passenger ticket and baggage check.[3] The Convention also requires that the ticket and check contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention."[4] Read together, the intent of these requirements is to afford the passenger a reasonable opportunity to take measures to protect himself against the airline's exclusion or limitation of its liability. Indeed, the Convention specifically provides that "the carrier and the passenger may agree on a higher limit

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[3] Article 3(2) provides in pertinent part:

"[I]f the carrier accepts a passenger without a passenger ticket having been delivered, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

Article 4(4) provides in pertinent part:

"[I]f the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at . . . [4(3)] (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

[4] Articles 3(1)(e) and 4(3)(h).

of liability.".[5] Manifestly, if the ticket and check delivered by the airline fail to notify the passenger that the exclusion or limitation provisions of the Convention are applicable, the passenger is not afforded a reasonable opportunity to protect himself by deciding not to take the flight, entering into a special contract with the carrier, or taking out additional insurance.

[2] We hold, therefore, that compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable.[6] *Cf. Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed. 2d 64 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Block* v. *Compagnie Nationale Air France*, 229 F. Supp. 801, 808 (N.D.Ga. 1964); Sand, Air Carriers'

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[5] Article 22(1).

[6] Article 4(4), pertaining to baggage checks (see footnote 3), specifically bars a carrier from excluding or limiting its liability under the Convention if it (a) fails to deliver a baggage check, or (b) delivers a baggage check which does not contain the required statement. However, Article 3(2), pertaining to passenger tickets, specifies only one ground for barring a carrier from excluding or limiting liability, namely, failure to deliver a passenger ticket. Defendant argues from this that in cases involving personal injury and death, the absence of the required statement from the passenger ticket is meaningless, and that so long as a passenger ticket is delivered before the passenger boards the plane, the carrier can exclude or limit liability. To support this contention, it cites *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S. D. N. Y. 1950), *aff'd*, 227 F. 2d 282 (1955), *cert. denied*, 350 U. S. 989, 76 S. Ct. 476, 100 L. Ed. 855 (1956). There it was held that a carrier could limit its liability for wrongful death even though it had failed to comply with Article 3(1)(c) by stating in the passenger ticket all the agreed places where the plane was to stop. However, we think the difference in importance between the statements required by Articles 3(1)(e) and 3(1)(c) destroys any argument that their absence from the ticket should be treated alike.

Appendix B
Opinion by MacMahon, D.J.

Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention, 28 J. Air L. & Com. 260, 262-63 (1962). Thus, if the tickets and checks issued here did not so notify the passengers, the challenged affirmative defenses are unavailable and must be dismissed.

We are of the opinion that a jury could not reasonably find that the passenger tickets and baggage checks delivered here notified the passengers that the exclusion or limitation provisions of the Convention were applicable and, accordingly, hold as a matter of law that defendant cannot exclude or limit its liability under the Convention in the case at bar. We think one look at the tickets and checks, which were combined in the form of small printed booklets, compels this conclusion. We set forth below replicas of the only applicable pages of typical tickets delivered here:

Outside Front Cover

of liability." [5] Manifestly, if the ticket and check delivered by the airline fail to notify the passenger that the exclusion or limitation provisions of the Convention are applicable, the passenger is not afforded a reasonable opportunity to protect himself by deciding not to take the flight, entering into a special contract with the carrier, or taking out additional insurance.

[2] We hold, therefore, that compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable.[6] *Cf. Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed. 2d 64 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Block* v. *Compagnie Nationale Air France*, 229 F. Supp. 801, 808 (N.D.Ga. 1964); Sand, Air Carriers'

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Appendix B
Opinion by MacMahon, D.J.

Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention, 28 J. Air L. & Com. 260, 262-63 (1962). Thus, if the tickets and checks issued here did not so notify the passengers, the challenged affirmative defenses are unavailable and must be dismissed.

We are of the opinion that a jury could not reasonably find that the passenger tickets and baggage checks delivered here notified the passengers that the exclusion or limitation provisions of the Convention were applicable and, accordingly, hold as a matter of law that defendant cannot exclude or limit its liability under the Convention in the case at bar. We think one look at the tickets and checks, which were combined in the form of small printed booklets, compels this conclusion. We set forth below replicas of the only applicable pages of typical tickets delivered here:

Outside Front Cover

BIGLIETTO PASSEGGERI
E
CONTROLLO BAGAGLIO 2253538
PASSENGER TICKET and BAGGAGE CHECK

ALITALIA
LINEE AEREE ITALIANE
I.A.T.A. Member
Viale Maresciallo Pilsudski, 92 - ROMA (Italia)

2

passeggero dovrà esaminare attentamente questo biglietto e particolarmente le Condizioni esposte a pag. 3.
Each passenger should carefully examine this ticket, particularly the Conditions on page 4.

Appendix B
Opinion by MacMahon, D.J.

Page 4 of the Booklet

(See Opposite) ☞

CONDITIONS OF CONTRACT

1. As used in this contract, « ticket » means « Passenger Ticket and Baggage Check », « carriage » is equivalent to « transportation », and « carrier » includes the air carrier issuing this ticket and all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any labor incidental to such air carriage; « damage » includes death, delay, injury, loss or other damage of whatsoever nature arising out of or in connection with carriage or other services performed by carrier hereunder, Carriage to be performed hereunder by several successive carriers is regarded as a single operation.

2. a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929, (hereinafter called « the Convention ») unless such carriage is not « international carriage » as defined by the Convention. (See carrier's tariffs, conditions of carriage for such definition). Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables, and Carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; and for the purpose of the Convention the agreed stopping places (which may be changed by carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth in this ticket and any connection ticket issued herewith, or, as shown in carrier's timetables as scheduled stopping places on the passenger's route.

b) To the extent not in conflict with the foregoing, all carriage hereunder and other services performed by each carrier are subject to (i) applicable laws (including national laws implementing the Convention or extending the rules of the Convention to carriage which is not « international carriage » as defined in the Convention), governmental regulations, orders and requirements, (ii) provisions herein set forth, (iii) applicable tariffs, and (iv) except in transportation between a place in the United States and any place outside thereof and also between a place in Canada and any place outside thereof, conditions of carriage, regulations and timetables (but not the times of departure and arrival thereon) of such carrier, which are made part hereof and which may be inspected at any of its offices and at airports from which it operates regular services.

c) Unless expressly so provided, nothing herein contained shall waive any limitation of liability of carrier existing under the Convention or applicable laws.

3. Insofar as any provision contained or referred to herein, may be contrary to a law, governmental regulation, order or requirement, which universally cannot be waived by agreement of the parties, such provision shall remain applicable and be considered as part of the contract of carriage to the extent only that such provision is not contrary thereto. The invalidity of any provision shall not affect any other part.

4. Subject to the foregoing:

a) Liability of carrier for damages shall be limited to occurrences on its own lines, except in the case of checked baggage as to which the passenger also has a right of action against the first or last carrier. A carrier issuing a ticket or checking baggage for carriage over the lines of others does so only as agent.

b) Carrier is not liable for damage to passenger or unchecked baggage unless such damage is caused by the negligence of carrier.

c) Carrier is not liable for any damage directly and solely arising out of its compliance with any laws, governmental regulations, orders or requirements, or from failure of passenger to comply with same.

d) Any liability of carrier is limited to 250 French gold francs (consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths) or its equivalent per kilogram in the case of checked baggage, and 5.000 such French gold francs or its equivalent per passenger in the case of unchecked baggage or other property, unless a higher value is declared in advance and additional charges are paid pursuant to carrier's regulations. In that event the liability of carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.

e) Any exclusion or limitation of liability of carrier under these conditions shall apply to agents, servants or representatives of the carrier acting within the scope of their employment and also to any person whose aircraft is used by carrier for carriage and his agents, servants or representatives acting within the scope of their employment.

5. Checked baggage carried hereunder will be delivered to the bearer of the baggage check upon payment of all unpaid charges due carrier under carrier's contract of carriage or tariff.

6. When validated, this ticket is good for carriage from the airport at the place of departure to the airport at the place of destination via the route shown hereon and for the applicable class of service and is valid for one year from the date of commencement of flight except as otherwise provided in carrier's regulations. Each flight coupon will be accepted for carriage on the date and flight for which accommodations have been reserved, when flight coupons are issued on an « open date » basis, accommodations will be reserved upon application subject to availability of space.

7. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch, but no particular time is fixed for the commencement or completion of carriage. Subject thereto, carrier may without notice substitute alternate carriers or aircraft and may alter or omit the stopping place shown on the face of the ticket in case of necessity. Times shown in timetables or elsewhere are approximate and not guaranteed, and form no part of this contract. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

8. The passenger shall comply with all government travel requirements, present all visas, entry, and other documents required by the law, and arrive at the airport by the time fixed by carrier or, if no time is fixed, sufficiently in advance of flight departure to permit completion of governmental formalities and departure procedures. Carrier is not liable for loss or expenses due to passenger's failure to comply with this provision.

9. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

10. No action shall lie in the case of damage to baggage, unless the person entitled to delivery complains to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt, and in the case of delay, unless the complaint is made at the latest within 21 days from the date on which the baggage has been placed at his disposal. Every complaint must be made in writing and if mentioned within the times aforesaid. Where carriage is not « international carriage » as defined in the Convention, failure to give notice shall not be a bar to suit where (1) it was not reasonably possible for him to give such notice, or (ii) that notice was not given due to fraud on the part of carrier, or (iii) the management of carrier had knowledge of damage to passenger's baggage.

11. Any right to damages against carrier shall be extinguished unless an action is brought within two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. The method of calculating the period of limitation shall be determined by the law of the court seized of the case.

* Carriage effected wholly within the territory of Italy, which cannot be considered « international carriage » as defined by the Warsaw Convention, is governed by Italian Laws and Regulations concerning Contracts of Carriage by Air.

Appendix B
Opinion by MacMahon, D.J.

One of the Coupons

(See Opposite) ☞

ALITALIA

LINEE AEREE ITALIANE

2

552

Nº 2122677

TUNIS

NEW-YORK

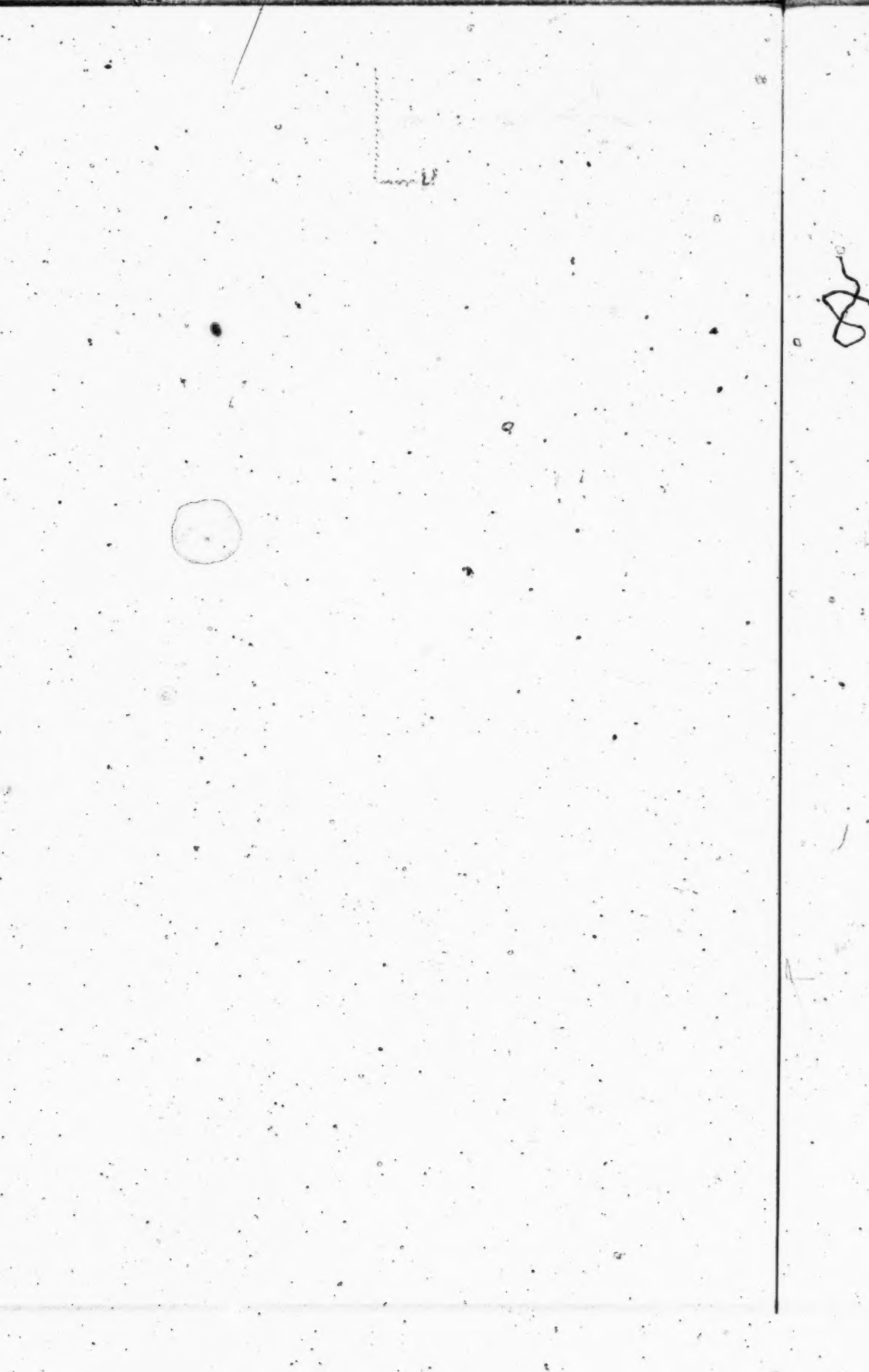
ROME

TUNIS

ROME

NEW-YORK

MR. DI SCLAFANI ALfredo



Appendix B
Opinion by MacMahon, D.J.

The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of "Conditions of Contract" crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.

"Lilliputian typography," *Eck* v. *United Arab Airlines, Inc.*, 20 App.Div.2d 454, 457 n.2, 247 N.Y.S.2d 820, 824, *rev'd on other grounds*, 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640 (1964), which must be read through "a magnifying glass," *Warren* v. *Flying Tiger Line, Inc.*, 234 F.Supp. 223, 230 (S.D. Cal. 1964), *aff'd*, 352 F.2d 494 (9th Cir. 1965), is at war with the intent of the Convention. This was recognized by our Court of Appeals in *Mertens* where one of the reasons for precluding the carrier from limiting its liability under the Convention was that the required statement "was printed in such a manner as to virtually be unnoticeable and unreadable. . . ." *Mertens* v. *Flying Tiger Line, Inc., supra* at 341 F.2d at 857.

We hold, therefore, that defendant failed to comply with Articles 3(1)(e) and 4(3)(h) of the Warsaw Convention and that the challenged affirmative defenses are unavailable to defendant in these actions.[7]

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[7] Plaintiffs also argue that the statements in the tickets and checks are wholly inadequate because framed in conditional terms. However, we think this argument meritless. If the statements were noticeable and readable, the passenger would have been sufficiently alerted to defendant's intention to use the Convention, wherever applicable, as a shield to ward off liability. This being so, the passenger could have called into play a variety of protective measures. *Accord, Seth* v. *British Overseas Airlines*

Appendix B
Opinion by MacMahon, D.J.

Our decision involves a controlling question of law which we think should be immediately appealed under 28 U.S.C. § 1292(b). *Cf. Warren* v. *Flying Tiger Line, Inc., supra* 352 F.2d at 495. We have done our best to reconcile *Mertens* and *Grey* (see footnote 6), but until the Court of Appeals has had the last word, there will remain substantial ground for difference of opinion on whether failure to notify in accordance with Article 3(1)(e) has the effect we say, and whether the defendant failed to notify here as a matter of law. To clear the air on the law applicable to the facts shown here, an appeal is advisable. Moreover, an immediate appeal may materially advance the ultimate termination of this litigation.

Accordingly, plaintiffs' motions for partial summary judgment dismissing defendant's affirmative defenses are granted, and trial of the actions stayed pending decision of the Court of Appeals on the controlling question of whether the challenged affirmative defenses are available to defendant in the light of the facts shown here.

So ordered.

Dated: New York, N. Y.
April 1, 1966

/s/ LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

Corp., 329 F. 2d 302 (1st Cir.), *cert. denied*, 379 U. S. 858, 85 S. Ct. 114, 13 L. Ed. 2d 61 (1964); *Samuel Montague & Co.* v. *Swiss Air Transport Co.*, English Court of Appeals, Jan. 21, 1966.

A third argument made by plaintiff Como representing members of the Disclafani family, whose journey originated in Tunisia, is that since the official language of Tunisia is Arabic, and the tickets were printed in English and Italian, the Disclafanis were not given notice. We do not reach this argument here. For the purposes of this motion, plaintiff Como has withdrawn a fourth argument that Tunisia was not a party to the Convention at the time the Disclafanis commenced their journey.

APPENDIX C

House of Commons: 740 Official Report 139 (8 Feb. 67) Col. 1569-1593

Civil Aviation (Carriage by Air Acts)

—1569—

10.30 a.m.

The Minister of State, Board of Trade (Mr. J. P. W. Mallalieu): I beg to move,

That the Carriage by Air Acts (Application of Provisions) Order 1967, a draft of which was laid before this House on 7th December, be approved.

Hon. Members on both sides of the House have pressed for the ratification of the Hague Protocol of 1955, which amended the Warsaw Convention of 1929. This was made possible by Section 1 of the Carriage by Air Act, 1961, which gives effect in the United Kingdom to the Warsaw Convention as amended by the Protocol, but for a variety of reasons that Section has not yet been brought into force and the Protocol has not yet been ratified. It is the Government's view that this should now be done and that the United Kingdom should join the 49 countries which have already ratified.

It will, perhaps, be convenient if I remind the House of the purpose of the Warsaw Convention, which is probably the most widely ratified of international Conventions in the field of private law, and of the existing legislation relevant to it. The Convention ensures a measure of international uniformity in the law governing international carriage by air, thereby eliminating difficult and potentially expensive litigation as to which country's law applies. It also confers on passengers and their dependants, and on the shippers of cargo, the reversal of the burden

of proving the carrier's negligence, in exchange for which the carrier enjoys a uniform limit of liability, which facilitates the arrangement of insurance. In the absence of wilful misconduct on the part of the carrier, his servants or agents, this limit is at present equivalent to some £3,000 per passenger.

The Carriage by Air Act, 1932, gave effect in the United Kingdom to this Convention and the Carriage by Air (Non-international Carriage) (United Kingdom) Order, 1952, made under the provisions of that Act, applied the same limit of liability to domestic and other carriage not covered by the Convention. Under the Act and the Order, therefore, the same limit is applied to all carriage, what-

ever the point of departure and destination or the nationality of the passenger or shipper, and it makes no difference where the accident occurs or which airline is involved.

I come to the Hague Protocol of 1955, which made a number of amendments to the Warsaw Convention and, in particular, raised the limit of liability from £3,000 per passenger, which was generally agreed among the nations to have become too low, to some £6,000 per passenger. With the passing of the years, that in turn has come to be regarded as on the low side, and international discussions have begun under the auspices of the International Civil Aviation Organisation with a view to the further amendment of the Hague-Warsaw system and, in particular, a further possible increase. It is the Government's hope that these discussions will be successful, but we recognise that several years are likely to pass before a new Convention or Protocol is drawn up, signed and ratified by a sufficient number of States.

Mr. David Webster (Weston-super-Mare): How many States would the hon. Gentleman consider to be a "sufficient number"?

Mr. Mallalieu: I should have thought that 49 would be a sufficient number.

We think, therefore, as I have said, that we should, without more ado, proceed to ratification of the Hague Protocol and are planning to lodge the instrument of ratification with the Polish Government on 3rd March, 1967. Allowing for the 90 days that mast (sic) elapse before it becomes effective, the Protocol will then be in force for the United Kingdom as from 1st June next.

On the same day the Carriage by Air Act, 1932, which gave effect to the provisions of the original Warsaw Convention, will be repealed by virtue of Section 1(3) of the 1961 Act and the Carriage by Air (Non-international Carriage) Order, 1952, made under it will accordingly cease to have effect. It is proposed that that Order, which, as I have said, applied the Warsaw provisions, with some exceptions and adaptations, to domestic and other carriage not governed by the Convention, should be replaced by the draft Carriage by Air Acts (Application of Provisions) Order, 1967, which is proposed to be made under

Section 10 of the Act of 1961, and which is now before the House. The draft Order will, of course, apply, as does the parent Act, to all forms of commercial air service; that is, to charter and inclusive tour flights as well as to scheduled services.

Mr. Eric Lubbock (Orpington): The hon. Gentleman is entitled under paragraph 8 of the Order to

> "... exempt any carriage or class of carriage ... from any of the requirements imposed by this Order".

Does the Department have any intention of exercising that power in regard to any class of carriage?

Mr. Mallalieu: There is an intention in regard to flying clubs, with which I shall deal.

Mr. Webster: Are we today trying to get in line with an existing Convention or are we stepping out of line in the hope that other countries will follow suit?

Mr. Mallalieu: We are today getting in line with the Hague Protocol to the Warsaw Convention.

As I was saying, the main provisions of the Order are, first, that it applies the principles of the amended Convention to domestic and other carriage which is not governed by either the unamended or amended Warsaw Convention. As permitted by Section 10, however, a number of "exceptions, adaptations and modifications" are made; for example, the omission of the requirements as to documentation and of the restriction of the courts in which actions may be brought.

A matter of more general interest, and one which will be particularly welcomed by the House, is that the draft Order raises the carrier's limit of liability in respect of domestic carriage and other types of carriage to which it applies to some £21,000 per passenger instead of the £6,000 which is the limit in the Hague Protocol.

Mr. Kenneth Lewis (Rutland and Stamford): In view of the difference in liability that there will be and, therefore, the difference in advantage to the public between an international journey and a domestic one, would the hon. Gentleman confirm that, in the event of a catastrophe, difficulty will be created? For example, if someone is travelling on

an international journey from, say, Manchester, that per-
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son will simply be covered by the airline's £6,000 liability, while someone else travelling on an international journey, but going first from Manchester to London and then picking up the international flight, will get double cover.

Mr. Mallalieu: That would depend on where the passenger had booked for. If he had booked from Glasgow to London, the passenger would be covered by one form of cover. If he had booked for an international route he would be covered by another form of cover. However, I am afraid to tell the hon. Gentleman that there is yet a further complication due to an agreement between airlines and the United States for this £21,000 cover to be extended to journeys across the Atlantic.

Mr. Cranley Onslow (Woking): Would the hon. Gentleman confirm that it will be perfectly possible for there to be, in the same aeroplane, four people with different tickets proceeding to different destinations and going on different types of journey and that all will be entitled under the Order to entirely different limits of compensation in the event of an accident?

Mr. Mallalieu: I do not think that that would necessarily occur if they were all travelling in the same aeroplane, since the same liability would appear to apply, but I will look into that point.

Secondly, this applies the principles of the amended Convention to the carriage of airmail, with similar exceptions, adaptations and modifications. Thirdly, as a transitional provision it applies, with the necessary modifications, those principles to the diminishing amount of

carriage still governed by the unamended Warsaw Convention to which the United Kingdom remains a party. Further, it applies the Warsaw-Hague system to gratuitous carriage by the Crown, carriage by the Crown for reward, already being covered in that system. As permitted by Section 10(3), it gives the Board of Trade power to exempt any class of carriage from the requirements imposed by the Order.

If the draft Order is approved, and it and the Hague Protocol come into effect in this country on 1st June, 1967, there will then be three classes of carriage governed by their provisions: first, carriage governed by neither the

amended nor the unamended Convention where the £21,000 limit will apply—for example, London to Glasgow, London to Gibraltar non-stop and London to Istanbul non-stop, since Turkey is not yet a party to either the Protocol or the unamended Warsaw Convention; secondly, carriage governed by the Warsaw Convention as amended by the Hague Protocol where the £6,000 limited liability will apply. An example of that would be carriage between London and Paris, since both the United Kingdom and France will then be parties to the Protocol.

Thirdly, there is the residual and diminishing amount of carriage still governed by the unamended Warsaw Convention where the £3,000 limit will apply. An example of that would be London to Delhi until such time as India also ratifies the Protocol, although the return journey London—Delhi—London will be governed by the Protocol. In practice, however, a great deal of this carriage, namely carriage involving a stop in the U.S.A., will be governed by arrangements under which the major airlines have

voluntarily agreed to a limit of £21,000 as an interim measure pending the further revision of the Convention.

It is unfortunate, as hon. Members very well sense, that there must be these variations in the limits, but uniformity is not something that we can achieve by ourselves in advance of a satisfactory outcome of the international discussion which I have mentioned. Nevertheless, our proposals do, I believe, represent a valuable advance on the existing situation where both international and non-international carriage is subject to the same limit of £3,000 and, having regard to the interests of the ever-growing number of the public who travel by air, I am sure that the House will wish to approve the Order.

10.42 a.m.

Mr. Anthony Grant (Harrow, Central): While I do not oppose this Order in principle as such, I wish to raise a rather technical but nonetheless important matter arising out of a certain decision in America on airline liability. It is of profound importance to the airlines and, therefore, to the travelling public. First, I express my apologies

to the Minister for probably having to leave before any reply is made to this debate because I have another meeting to attend. I trust that he will acquit me of any seeming discourtesy.

The position, I understand, is that the Warsaw Convention imposes an absolute liability upon airline carriers in exchange for which they can put a limit on the damages and the compensation which they pay. In this sense it has worked out to the advantage of carriers throughout the world. I understand that last May the United States nearly left the Convention, but was persuaded not to do so. If

it had left, the position would have been that in the event of injury being suffered in America the passenger would have had the onus put on him to prove ordinary airline negligence.

If he could succeed in that respect, his damages might well be unlimited. The provisions of this Convention, to which the United States is still a party, provide that a carrier must deliver a passenger ticket which contains certain particulars one of which is:

> "a statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention".

The Order says on page 10:

> "The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Schedule. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability".

In April, 1966, a case was heard in the United States courts called Lisi v. Alitalia Airlines. In that case Mr. Lisi's executors sought damages from Alitalia Airlines in respect of a crash at Shannon in Ireland. The decision of the court was that Alitalia had failed to comply with the provisions of the Convention in that the notice put on the ticket delivered to Mr. Lisi and others was in such microscopic type that it was impossible to say, according

to the court, that he had had sufficient notice of the excluded provisions on liability.

The case came to appeal before the Appeal Court in America last December. As a result of that appeal, great confusion now arises in the minds of those concerned

with air carriage. The appeal decision said in effect that a carrier has a duty of conveying the actual notice of the exclusion of liability to a passenger "in such time" —those are the relevant words—as the passenger can take self-protective measures against such exclusion of liability. Examples of that would be that the passenger could take out certain insurance, could come to a decision whether to travel or not knowing that this exclusion of liability existed, or have an opportunity to enter a special contract.

The practical position is that all over the world tickets are delivered very often only a few moments or a few hours, or perhaps a day or so, before actual departure. From an administrative point of view I am informed that it is entirely impracticable for airlines to give greater notice than they do now. Often it is a day or even hours or minutes before a plane departs. There is no certainty what the words "in such time" mean. If it is suggested that this should be a matter of weeks or perhaps a month to enable the passenger to consider all the ramifications of a separate contract and whether to travel or not, this would place an intolerable burden on the whole business of air travel.

If the case is upheld—and I understand that there is a possibility of it going to the Supreme Court in America—it would have the effect that a British airline which crashed or caused injury to a passenger in America would get the worst of both worlds. It would have the onus of absolute

liability and the onus would not be on the passenger. It would be subject to the Convention in that respect, but the airline would not be entitled to limit the damages.

On this basis I am advised that it would be better if the United States were out of the Convention. Then, although an airline would have unlimited damages to pay, the onus of preventing negligence would be on the passenger. For that reason the Government should be aware of the very great increase in costs which might arise if this decision before the Supreme Court were upheld. The first question which I put to the Government on this Order is whether they are aware of the litigation and decision in the Lisi v. Alitalia case. Do the Government realise that, if the decision is unreversed by the Supreme Court, it will lead

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to an enormous increase in airline claim costs in the United States? If the decision is unreversed, will the Government give consideration even to withdrawal from the Warsaw Convention on these grounds? What steps are being taken to reverse the effect of this decision?

In addition, a meeting has just taken place—I believe that it has been adjourned—of an international panel of experts in Montreal which has been looking into the whole question of amendment to the Convention. Could the Government delay their decision until the experts have had a chance of considering the ramifications of this case? Is it possible that the United Kingdom could postpone the ratification of the Hague Protocol in order to see whether it is worth staying in the Warsaw Convention if the Lisi case remains part of the law of the United States?

I appreciate that the Government might well say that it is vital that we get on with this Order in order to comply

with the requirements of the Hague Protocol. If that is so, they should be alerted to the fact that, although we do not oppose the Order in principle, there are a number of imperfections—this is a very profound and important one—and they should seriously consider the possibility of producing an amending Order later when the result of this very vital decision is known.

10.51 a.m.

Mr. R. J. Maxwell-Hyslop (Tiverton): It would be extremely ungenerous of me to do anything other than welcome this very timely Order. Hon. Members will remember that on the Report stage of the 1961 Act I proposed an Amendment upon which this Order actually improves. My Amendment was lost by one vote. Therefore, I cannot do other than welcome an Order which on many domestic flights—that is, those which are not subject to the exemption procedure—raises the limit of damages to £21,000.

I must state, however, that the Order still leaves the slight anomaly, which was brought out in 1961 that if someone is killed in a railway train the limit of damages is £24,000 but if someone is killed travelling by air the limit is £21,000. I should have been happier if the figure had been consolidated at £24,000 so that the limit was the same by air on domestic flights as it is for rail accidents. How-

ever, I repeat that it would be extremely ungenerous of me not to welcome the very considerable improvement to £21,000.

In the 1961 debate it was immediately apparent from the reaction of hon. Members that nobody understood the import of the statements on an airline ticket about the limit of liability. Article 8 of the Order reads:

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"The Board of Trade may, subject to such conditions as they think fit, exempt any carriage or class of carriage or any person or class of person from any of the requirements imposed by this Order."

So far, so good, but it is very important that anybody flying on a domestic flight should know whether his carriage on that flight is or is not exempted; and, if it is exempted, what the effect of the exemption is.

I must apologise to the Minister of State, Board of Trade for the fact that, as I was due at a meeting of B.E.A. earlier this morning than now, I shall probably have to leave before he commences his winding-up speech. However, I should be very grateful if he could put on the record in that speech what his own guidelines within his Department will be for operating Article 8, so that the public at large can know in what circumstances flights are likely to be exempted, what notice will be given to people that they are exempted, and what the result of such exemption will be.

My hon. Friend the Member for Woking (Mr. Onslow) stated that there are four different classes of potential passenger from the point of view of limitation of liability. My count makes it at least six. There are domestic flights which will be subject to the Order—that is, with a limit of £21,000. There will be domestic flights exempted from the Order under Article 8. There will be domestic flights which do not fall within the provisions anyway, because they are subject to concession—for instance, an airline employee travelling under concession on that airline. Then there are international flights subject to the Order. There will be international flights subject to the Guadalajara Conven-

tion. There will be international flights which are not subject to the amended procedures—Turkey being one. Those are six different classes of passenger. I do not claim that it is an exhaustive list.

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I ask specifically not only that the Minister should give the House the guidelines for the rules he makes but that in making those rules there should be a prominent notice, not just a fine print statement, on all tickets issued under the exemption provisions of Article 8, drawing effectively to the attention of the would-be passenger the fact that it is exempted. Sometimes a ticket contains an announcement that the flight is subject to certain exemptions or conditions, the details of which can be obtained from the ticket office. This notice appears, for instance, on a railway ticket. If the intending passenger asks the booking clerk for a copy of the conditions under which the ticket is issued, he is told that he must go either to Paddington station or somewhere equally remote to obtain the copy. Therefore, to issue, for example at a flying club, a ticket having on it a notice stating that the flight is subject to exemption from the provisions of the Order, without also having prominently displayed a statement of the effect of the exemption, is what I call a lawyer's notice rather than a reasonable person's notice.

Mr. Grant: In defence of a very great profession of which I am a member, I point out that it is lawyers who draw attention to the smallness and obscurity of type on notices.

Mr. Maxwell-Hyslop: That is true, but lawyers have to be employed before they draw attention to it. Reverting to the subject of notice, it is particularly important that it should be comprehensible.

Where there are such exemptions, which are exemptions from a reasonable limit, it is relevant to rehearse again why it is just and desirable that there should be different limits on domestic flights from those which apply to international flights. The reasons are basically these. It is not only difficult and expensive, but also sometimes impossible, to prove negligence, even in a British court, because so much of the evidence of the cause of the accident is destroyed in the accident.

It is difficult enough to prove negligence in the case of air accidents in a British court—in the cost of which, incidentally, if people are impecunious they may be assisted

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through the Legal Aid fund. It is very much more difficult to prove negligence in a court thousands of miles away where the standards of justice and the court procedures are, to put it mildly, not entirely consistent with our own. The advantage which passengers or their dependants receive under the Warsaw Convention, the Hague Protocol, and the Guadalajara Convention, is that it is no longer necessary to prove the negligence of the airline concerned. It is necessary only to demonstrate that the damage or death resulted from the accident and there is then an automatic entitlement.

I remark in passing that the limit of damages does not apply when wilful misconduct can be proved against the pilot or aircrew. But this also is extremely difficult to prove when all the people concerned are dead and there is just wreckage left on the ground. Therefore, one may say that, to all intents and purposes, the limit applies and the balance of advantage lies with Measures of this kind.

On domestic carriage, this is not so to the same extent because people have access to the British courts and they

are not debarred for financial reasons. Nevertheless, one must bear in mind that a substantial proportion of the traffic on domestic flights is business traffic rather than holiday traffic. It is fair to say that people who use internal air routes in the course of their profession or occupation are most unlikely to be earning less than £1,000 a year. Capitalising that at, say, 6 per cent., it comes to more than £21,000. I am not a lawyer, but I understand that the normal basis of compensation is to capitalise the income which the dead person was receiving.

I say that merely to show that £21,000 is not an over-generous figure. I hope that the Minister, whoever he may be and whoever the Government may be, will not feel that, now that this excellent Measure has been brought in, it must necessarily run for the next 10 or 15 years unamended. As the level of incomes rises so does the damage suffered by someone incapacitated or by the dependants of a person killed on a flight.

I welcome the Order, therefore, though without prejudice to pressure for increases in the limit of liability in the future *pro rata* with the fall in the value of money and the rise in average earnings.

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Mr. Kenneth Lewis: Will not my hon. Friend agree that the increase in the limit of compensation now to be available for the domestic passenger will create, an anomaly in relation to someone travelling, for instance, from the United Kingdom and flying in the United States? It will be an international flight, but the flight across the United States will be a domestic flight. There is a great difference between a domestic trip within the United States, which can be as long as a journey from the United States to the

United Kingdom, and a domestic trip within the United Kingdom. Is there not an anomalous distinction here created by the difference between compensation paid for an international flight and compensation paid for a domestic trip?

Mr. Maxwell-Hyslop: With respect, no greater anomaly is created than is already the case in travel by surface transport in a foreign country, which is subject to the domestic law of the country concerned. I say, in passing that, as I read the present law as amended by the Order, if one is making a journey from one British territory to another without calling at an airport in the United States, it is immaterial whether one overflies the United States or not. It is certainly true that there are many different classes of carriage, but what my hon. Friend says applies whether one travels by ground transport or by air transport. What we are endeavouring to do is to reduce the restriction on damages in so far as we are able to do so, and this Order undoubtedly does that.

I mention one further matter *en passant*. Many people take out insurance to cover themselves in excess of the limit of liability imposed. It is all the more important that this insurance cover should be available when Article 8 of the Order is invoked and there is exemption by Ministerial licence. The normal way of obtaining this further cover is by putting a coin into a slot machine with a time-stamping device inside. Out comes a ticket selling the cover, beginning at the time stamped on it by the clock.

It is common knowledge that the times of greatest risk are on landing and take-off. It is particularly important,

therefore, that the clocks stamping the time are not fast. If a clock is fast it can have the result of marking a time

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for beginning the insurance cover after the person has taken off in the aircraft. This is not hypothetical. Twice I have been to an airport in the United Kingdom at which the clock was as much as 15 minutes fast. If someone purchased insurance cover immediately before boarding the aircraft and the aircraft then crashed on take-off, the insurance company would not, except *ex gratia,* be at risk although the passenger believed that he had covered himself. I do not know how far it is possible to deal with this, but it is one of the considerations which the Minister would do well to bear in mind in issuing an exemption under Article 8.

I end as I began, by welcoming the Order. I wish that it had been brought in much earlier. A long time has elapsed since the passage of the Carriage by Air Act, 1961, and I have badgered successive Ministers of successive Governments to be more expeditious in the matter. We shall all be grateful for the Order, and the fewer the exemptions granted by the Minister the more certain will the law be in the knowledge of the average passenger.

11.8 a.m.

Mr. John Rankin (Glasgow, Govan): I am sorry, though the House may be glad, that my remarks must on this occasion be very brief. I am serving on a Standing Commitee in which there are liable to be Divisions, and I may be called suddenly. That control is an unfortunate control, but I feel that I must at least say, "Thank you" to my hon. Friend the Minister, as did the hon. Member for Tiverton (Mr. Maxwell-Hyslop). The hon. Gentleman

and I five years ago emphasised to the Minister at that time the need to amend the provisions covering carriage by air, and now, like him, I rejoice in the raising of the limit. I endorse every word the hon. Gentleman said. I hope that the Minister will remember that it is not a final sum. We recognise that travel by air is getting safer every day and is now much safer than it was even five years ago. Those of us who use air transport realise that. But the result of an accident in the air is so comprehensive and final as compared with an accident in almost any other medium of travel that the compensation must bear relationship not only to the falling value of money but to that

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finality. That must be a factor in estimating the compensation.

Mr. Onslow: I have been trying to follow the hon. Gentleman's argument. Is he saying that there is a particular quality about death in an aircraft accident which means that the liability limit should be higher than for death in a car or train accident?

Mr. Rankin: I may not have expressed myself very well. I believe that travelling by air involves the possibility of finality in an accident, but that an accident is not so liable to occur as in travel by sea or road. In the event of an aircraft accident, the number of survivors is generally very small, if any. It is merely a matter of observance, and from my knowledge of accidents in the air I have no reason to change what I have said. There is certainly always the chance of finality in a railway or bus accident, and so on, but the risk is not so great as it is by air and therefore I believe that that should affect the figure of damages when an accident occurs.

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I notice that liability starts at the terminal, according to Article 18(3) of the Convention. If I read that accurately, the passenger is regarded as being covered by the liability for compensation from the moment he leaves the terminal.

I am glad that my hon. Friend has brought forward this improvement in the Carriage by Air Acts, but I feel that the Explanatory Note might have been more comprehensive. I hope that when there is an amendment of the Order the Explanatory Note will tell us exactly what it means and will be fuller than the rather brief comment that this Explanatory Note gives.

11.15 a.m.

Mr. Eric Lubbock (Orpington): I must disagree strongly with the hon. Member for Glasgow, Govan (Mr. Rankin) over the implied suggestion in his speech that travel by air is more dangerous than travel on the roads. If he looks at the statistics he will find that the number of people killed on our roads every year is many times larger than the number of people killed in air travel in the whole world.

Mr. Rankin: I did not say anything of the kind. I did not say that travel by air was more dangerous. I said

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that in the event of an accident the outcome was more certain.

Mr. Lubbock: That is indeed what the hon. Gentleman said. I disagree with him on that as well, because many minor accidents take place on the airlines which do not result in either the injury or death of a passenger. Perhaps they are not given the same prominence as accidents in which the whole aircraft is lost with all the passengers,

but if the hon. Gentleman looks at the tables published periodically in *Flight* and other aviation magazines, he will see that quite a number of accidents occur in which there is no injury to any of the passengers or crew. It would be misleading the public if we suggested that in the event of an accident on an aircraft their chances of being killed were very much higher than in other means of transport. That will not help what both the hon. Gentleman and I wish, which is to encourage more people to travel by air.

Mr. Rankin: I am sure that the hon. Gentleman does not seek to expand what I said beyond what was contained in the words I used.

Mr. Lubbock: I hope that I was not doing that, but I think that the hon. Member for Glasgow, Govan may have given that impression during some of his remarks.

The hon. Member raised the interesting question whether one is covered in transit from the terminal to the airport. As I read Article 18(3), cover applies only in cases where the contract for carriage from the terminal to the airport is part of the contract for carriage by air from the airport onwards. I understand that one's contract in respect of the bus from the London Air Terminal to Heathrow is separate from the contract one enters into with the airline for a flight from Heathrow to Glasgow, for example.

It would be of great importance if the Minister could clarify this in his reply, because my impression is that the journey along the M4 in one of the buses is a great deal more dangerous than the journey from Heathrow to Glasgow. A great many passengers would like to know if they were covered on the bus journey as well.

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I hope that my main point will not be a discordant
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note in the general welcome expressed for the Order. It is the question of the effect of the increased limits on the domestic air fares. I shall not argue with the principle of the Order, because I agree with the hon. Member for Tiverton (Mr. Maxwell-Hyslop) that higher limits are necessary and are inevitable in the end. But the Minister might consider delaying the application of the increases to a date after 1st June for domestic airlines. I take it that he has power to do that under paragraph 8, although he said in reply to an intervention from me that that paragraph was intended to apply only to the flying clubs.

I have made some inquiries of experts, who have given me figures relating to various airlines, of the likely effect of the increased premiums on their domestic fares. Airline "A" says that the increased premiums would amount to £50,000 to £60,000 annually, and would mean a demand for a further increase of 3 to 4 per cent. in its fares. I shall not quote them all. Airline "C" says that the cost of increased premiums would be between £50,000 and £70,000, which amounts to about 5s. on each ticket issued.

No doubt, the hon. Gentleman will have made some inquiries of the airlines about the financial effects of the Order and will have considered the possibility that they may apply to the Air Transport Licensing Board for increases in the domestic air tariff as a result of the Order coming into operation on 1st June.

There might be a possible conflict with the Government's policy for prices and incomes, which was referred to in the last Report of the Air Transport Licensing Board. After reviewing a number of applications for domestic fare

increases which had been submitted during the year, the Board concluded, in paragraph 77, that

> ". . . on the basis of the White Paper criteria there was only limited justification for the increases proposed. But the White Paper does not consider the case of an enterprise that has for some time been operating at a loss, and is likely even with the utmost managerial exertions to continue making losses throughout the foreseeable future unless additional revenue is obtained. In such circumstances the enterprise must choose between increasing prices or going out of existence; and it is under conditions such as these that the greater part of British domestic air services have been operating."

Has the Minister taken into account this situation in

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the domestic market and what is the likely effect on fares if operators now go to the Board and ask for increases to cover the cost of these premiums? Such applications would be allowable within the terms of the White Paper on the Prices and Incomes Standstill and Period of Severe Restraint, paragraph 10 of which says that increases in costs which are the direct result of Government action may be recovered by persons offering goods or services. Therefore, the Board would be quite likely to approve applications for fare increases by the operators. But this is a long-winded process. First, a notice has to be published in the Civil Aviation Licensing Notices. Then time is allowed for objections. Finally, there may be a public hearing and an appeal from the Board's decision to the Minister. I doubt whether airlines operating on domestic

routes could take steps to recover the difference between now and 1st June when the Order comes into operation. There will, therefore, be a temptation when they bring applications up not only to recover the full amount of additional premiums but also the difference in the premiums they have had to pay pending their applications being heard by the Board.

There might be a conflict with the prices and incomes policy during the period of severe restraint, which operates in the first half of 1967, and possibly with any further developments of the policy which may be agreed by Ministers for the second half of 1967. I know that it would be out of order to go into that in detail, but most of us can already see that some form of restraint on prices and incomes will be necessary for a much longer period than the first half of 1967 and this will apply to domestic air fares just as to any other commodity.

I want some indication from the Minister that these factors have been taken into consideration and that he has in mind the possibility of using the powers conferred on the Board of Trade by paragraph 8 of the Order or of deferring the increase in the limit for domestic traffic at least some time beyond the period of the ending of severe restraint, until a definite announcement is made of Government policy for prices and incomes in the second half of the year.

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11.25 a.m.

Mr. Cranley Onslow (Woking): Many of my hon. Friends who might otherwise have wished to take part in the debate because of their interest in aviation are unavoidably absent. They are fulfilling an engagement which was fixed before

today's business was announced. That other engagement will enable them to keep themselves informed on important matters in aviation. I mention this because it is an additional example of the disruption and hindrance to the ability of right hon. and hon. Members to deal with other business that the morning sittings have caused.

I have attended all three morning sittings, and I begin to understand, as I hope the Leader of the House has begun to understand, what a severe strain this must be imposing on the House's servants, inside and outside the Chamber, by no means least on Mr. Speaker. I should be glad to know in any case that this is a matter to which the Leader of the House is devoting particular care and attention.

I have a number of points I want to put that my hon. Friends would have wished to have examined. He will understand that my intervention will not be as short as I might otherwise have wished in the circumstances. In so far as the Order represents a move to apply the principles of the Hague Protocol to domestic and non-international carriage, it is a welcome move. It follows, of course, the decision to apply the £6,000 Hague Protocol limit of liability to international carriage by United Kingdom ratification of the Protocol and there is no doubt that the old Warsaw limit of £3,000 had long been outdated.

The Order also has the effect of raising the limit of liability for domestic and non-international carriage from £3,000 to £21,000. On this and on a number of other general and particular points, I should like to put some questions to the Minister, and I hope that he will be able to answer them at the end of the debate.

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First, what prior consultation did the Department have with the airline operators, both nationalised and independent, before tabling this Order? The hon. Gentleman will be aware that there has been some criticism in the aviation

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Press of the fact that the Order was brought before Parliament without adequate consultation with or warning of the operators. This way of proceeding is not exactly improving the confidence of airline operators in the sort of treatment they are to expect from the Board of Trade now that it has taken over responsibility for civil aviation matters. Can the hon. Gentleman explain why he has chosen this point of time to raise the non-Convention limit—the limit for domestic and non-international carriage—to £21,000? I recognise that B.E.A. has to some extent forced the pace by—and I quote the word—"voluntarily" agreeing to the terms of the Montreal Agreement of 1966 for all its international services. But I am by no means sure that the introduction of the new £21,000 limit under this Order and at this point in time will help to simplify or clarify matters.

It may be the Minister's view that the £21,000 limit should come to be accepted by all British domestic carriers. But does he feel that he has increased the chances of this by his timing of the Order? Has the Department any powers over British air operators to oblige them to conform in this respect? If so, is it the intention to use such powers? Will he consult the operators before doing so? If he has not got powers to do that, has he any intention of seeking them?

Mr. Lubbock: He has them.

Mr. Onslow: I hope that the Minister will take up these points because I am not sure that the hon. Member for Orpington (Mr. Lubbock) is right in saying that he has these powers.

Is the Minister aware, further, of the effect of the introduction of the £21,000 limit upon the costs of airline operators? This was mentioned by the hon. Member for Orpington, and it seems—and I have had access to the same sort of figures—that this will cause an increase in insurance premiums which cannot in many cases be absorbed. The remarks of the Board in its report about obligation to make them are open to question and are relevant in this context. It is clear that many operators are up against severe pressure for fare increases and this is likely to be greatest, possibly, in the case of operators whose route pattern is shortest—in other words, which

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have the least revenue per flight and upon which the cost of the increased premiums will represent the greatest percentage increase in costs.

The Minister must recognise that the existing licensing processes would prevent the operators from introducing higher fares until the end of this year, even if they were authorised to do so. This must make it very questionable whether this was the right time or the right way to introduce a new domestic limit. There are some other reasons to which I shall return.

I ask the Minister to clarify the use to which he envisages putting Article 8, which provides for exemptions. Has he any intention of using this to postpone the application of the Order to domestic services for a transitional period, say, until January, 1968, by which time operators might have been able to adjust their tariffs to the increased

premium costs? If so, what procedure does he propose to apply for granting exemptions, and for advertising exemptions when granted?

If it is not his intention to use this Article for that purpose, then for what purpose is it intended? I understand that the Order applies to gratuitous carriage, as well as to carriage for reward, but in the past exemptions have been made in the provisions of existing Acts in favour of *bona fide* flying clubs.

In principle, this clearly makes sense, but the making of exemptions can lead to difficulty if the exemptions are not known. Will the Minister undertake to arrange to publish, in some prominent and accessible place, the details of any exemptions which he may make under Article 8? This is a point which was made forcibly by my hon. Friend the Member for Tiverton (Mr. Maxwell-Hyslop).

There are two other points of detail in the Order. First, can the Minister tell us how the provisions in the Order relating to air mail are to be applied in practice? Clause 4*(b)* of Schedule 1 of the Order applies to the carriage of mail or postal packets and Articles 24 and 30 of the Schedule appear to restrict the rights of action to the consignor or consignee of cargo, as airmail has to be treated. Who, in this context, are the consignor or consignee? Is the consignor the member of the public who sends something

by air mail? If so, evidently some consequential amendments to the Post Office Acts will be needed. Or is the consignor and the consignee the Post Office in each case? If so, then in this respect the Order seems to be useless to the general public, and, indeed, it could have the effect of enabling the Post Office to be entitled, in the case of loss,

to recover more in damages from the airline than they would be obliged to pay out under the very limited international compensation scheme for the senders of air mail. There seems to be the need for clearer drafting. Certainly a definition of who is to be regarded as consignor and consignee would help to reduce the future danger of unnecessary litigation.

On another point of clarity and definition, can the Minister explain some of the terminology which is used on page 12 of the Order under Part B of Schedule 2? Here we have the terms "The amended Convention", "The amended Warsaw Convention", and "The unamended Warsaw Convention", all appearing within the space of five lines, and all apparently intended to mean much the same thing. This seems to be quite unnecessarily confusing. It should surely have been possible to tighten up the draftsmanship and to eliminate this kind of terminological imprecision.

Regarding the overall effect of the Order, the Minister is presumably aware that it will not greatly reduce the number of anomalies which already exist in the limits of liability in individual cases. Different passengers sitting next to each other in the same aircraft may be eligible for quite different limits, depending on the type of their ticket, their point of departure, and their ultimate destination. I hope the Minister will take up this point. I put to him the case of the B.K.S. Airlines flying from Leeds to London. There might be a Mrs. X, a Leeds housewife, on a day trip to London. She would be entitled to a limit of £21,000. A Mr. Y, on a week-end trip to Paris, would be entitled to a limit of £6,000, and Herr Z, returning to Vienna, would be entitled to a limit of £3,000. If, however,

he flies on from London via B.E.A., he would then find that his limit goes up again to £21,000.

This seems to be a confusing situation, and it certainly emphasises the importance of securing greater interna-

—1590—

tional standardisation, as well as domestic standardisation. Does not this in itself make it premature for the United Kingdom to have introduced the £21,000 limit domestically and for non-Convention carriage in advance of international agreement?

Can we possibly support a lower limit of liability internationally, and, if not, does this not make it difficult to enable us to enter into any future diplomatic conference with any room for manoeuvre? Will not our commitment to the £21,000 limit make it difficult to persuade other nations to accept the existing Conventions and Protocol? There are still over 30 nations involved in international air transport which are parties to none of these agreements.

Why did the Government decide to introduce this Order before the meeting of the I.C.A.O. panel of experts in Montreal, and what instructions were given to the British member of that panel? I should probably be out of order if I were to probe too far into the Government's ideas for future progress towards a long-term solution of the problem of keeping the Warsaw Convention up to date. What is it in the idea of a new convention which so attracts the Minister? Would it not have been possible and better to proceed by way of modification of the existing inter-carrier agreements such as that of May, 1966?

No doubt the Minister will be aware of the complications which may arise from the case of Lisi v. Alitalia, mentioned by my hon. Friend the Member for Harrow, Central

(Mr. Grant). I hope the Minister will be particularly careful to say what action he sees as being necessary if that case is not reversed on appeal.

Finally, in the timing of the Order, and in what I regard as the premature commitment to the £21,000 limit, there seems to be a strong suggestion that the Government are meekly following the lead of the United States. It was the threat of unilateral action by the American Government, almost amounting to an ultimatum, which forced airlines to accept last year's Montreal agreement. It seems to some people that we are again capitulating without protest to pressure from across the Atlantic. We know that that pressure may well be renewed in future. While there may well be arguments for working in an orderly and sensible

—1591—

way towards a domestic limit for carriage by air liability which corresponds to the railways limit, as the hon. Member for Tiverton pointed out—and which domestic carriers might ultimately accept if they were properly consulted—I hope that the Minister will assure us that he sees his Department's functions in this respect as being to promote international order rather than, as it appears in some respects at this moment, international chaos.

11.39 a.m.

Mr. J. P. W. Mallalieu: On the last point which the hon. Gentleman the Member for Woking (Mr. Onslow) made, we are most anxious to try to get international order. I agree with him that some of the immediate results of this Order will be to increase the anomalies. We are doing all we can to get a full international agreement, and we shall continue to press for that in the hope of ironing out some of the anomalies which still exist.

The hon. Gentleman, as well, as his hon. Friend, the Member for Harrow, Central (Mr. Grant), raised the highly technical, but very important, point about the law case Lisi v. Alitalia. I understand that there is a likelihood of an appeal to the United States Supreme Court against the decision of the lower court. The fact that there is dubiety about this is no reason for not proceeding with The Hague Protocol, because a decision in this particular case, as and when it comes, will not affect very large numbers of the routes which The Hague Protocol covers. This Lisi case is being watched by the British Government and the experts of the International Civil Aviation Organisation are watching it with the greatest care. Depending on what the final decision is, we shall have to decide then what action we can take. I am grateful to hon. Members for raising this matter which is clearly of great importance.

The hon. Member for Tiverton (Mr. Maxwell-Hyslop), the hon. Member for Woking, the hon. Member for Orpington (Mr. Lubbock) and others were concerned about Article 8 and the exemptions which we might be considering. We have no intention whatever of giving widespread exemptions under this Article. All commercial flying, both scheduled and non-scheduled, will be subject to the provi-

sions of the Order. As I said earlier, the exemptions which we have in mind are for *bona fide* flying clubs and the movement of troops. The ordinary business of the airlines will not be exempted in any way.

The hon. Member for Tiverton made an interesting comment about clocks in the insurance slots showing the wrong time. That is obviously important, but it is something which is not covered by the Order. However, I shall make a point of calling the attention of the various airport

authorities to it to make sure that these clocks are kept up to time.

The hon. Member for Orpington asked whether the Order covered passengers on their way from a terminal to an airport. I am advised that it does not. It deals with accidents in the plane, or when actually loading or unloading the plane, but not in the bus. I should imagine that that would be a matter for a separate contract.

The Government have recognised, as they must, that insurance costs will go up and that applications for increases in domestic fares may result. This will be considered by the Air Transport Licensing Board which has some obligation to consider increases in the light of the Government's prices and incomes policy. I do not myself want to make any pronouncement on that, because, I understand, I might be called upon to make a final decision on such applications and it would be altogether wrong for me to pre-judge them.

Mr. Onslow: The hon. Gentleman says that he regards the A.T.L.B. as having some obligation to have regard to the Government's prices and incomes policy. Does it have any statutory duty to do so?

Mr. Mallalieu: I understand that it does.

There were several consultations between the Board of Trade and the operators, B.O.A.C., B.E.A., B.I.A.T.A. and insurance interests. I cannot pretend that there was absolutely unanimous agreement, for there was not. It was agreed that the limit should be raised, but there was disagreement about the exact figure. We tried to pick what we thought was the most sensible figure and that most likely to be adopted internationally.

Appendix C
House of Commons Report

We have no present power to compel British operators to conform to the £21,000 limit and we are not proposing to seek such power at present. We intend to wait until the international negotiations are complete. A number of fairly detailed questions have been asked and I will make a point of writing to the hon. Members concerned.

In general, the House has given a welcome to the Order and I in turn give the assurance that this is not just a once-and-for-all settlement of the matter. It must be kept continually under review in view of the law cases and possible changes in the value of money and so on. We give an assurance that that will be done and in the light of that assurance I hope that the House will now agree to accept the Order.

Question put and agreed to.

Resolved,

That the Carriage by Air Acts (Application of Provisions) Order 1967, a draft of which was laid before this House on 7th December, be approved.

Appendix C
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Question put and agreed to.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, ETC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

and

BRIEF FOR THE INTERNATIONAL AIR TRANSPORT ASSOCIATION AS AMICUS CURIAE.

HAROLD L. WARNER, JR.,
25 Broadway,
New York, N. Y. 10004,
Attorney for the International Air Transport Association.

J. G. THOMKA GAZDIK,
CARL S. ROWE,
PAUL G. PENNOYER, JR.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1169.

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, ETC., *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

The International Air Transport Association moves this honorable Court for leave to file the attached brief as *amicus curiae* in the above entitled cases.

Consent to this filing has been given by the attorneys for Alitalia-Linee Aeree Italiane, S.p.A., petitioner. The consent of the attorney for the respondents was requested but refused.

The nature of the movant's interest, and its reasons for believing that these cases present issues of such international and nationwide interest that the Court should grant a writ of certiorari are contained in the brief.

Respectfully submitted,

INTERNATIONAL AIR TRANSPORT ASSOCIATION
by its attorney,
HAROLD L. WARNER, JR.
25 Broadway
New York, N. Y. 10004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1169.

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, ETC., *et al.*,
Respondents.

BRIEF FOR THE INTERNATIONAL AIR TRANSPORT ASSOCIATION AS *AMICUS CURIAE.*

Introduction.

The International Air Transport Association ("IATA") respectfully submits this brief *amicus curiae* in support of the petition of Alitalia-Linee Aeree Italiane, S.p.A. ("Alitalia") that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above entitled cases on December 16, 1966, 370 F. 2d 508.

The Nature of IATA's Interest.

IATA is a body politic incorporated by special Act of the Parliament of Canada, 9-10 George VI, in 1945 for the following objectives:

(1) to promote safe, regular and economic air transport for the benefit of the peoples of the world, to foster air commerce and to study the problems connected therewith;

(2) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service;

(3) to cooperate with the International Civil Aviation Organization and other international organizations.

The Head Office of IATA is in the City of Montreal in the Province of Quebec. IATA has a membership of one hundred airlines from over sixty countries. The list of the IATA membership is set forth in Exhibit 1 hereto.

In 1949, the Civil Aeronautics Board first approved IATA's uniform passenger ticket so that "Uniform conditions of carriage will be applicable to the entire journey." 10 C.A.B. 783, 784. In 1957, the Civil Aeronautics Board approved the form of IATA passenger ticket involved in these cases. 24 C.A.B. 575. Based on such governmental approval and that of other nations,[1] the standard IATA ticket has become an accepted international document. Over 90% of all scheduled international air traffic moves under this standard ticket. The IATA ticket is being honored and used by the world's airlines on the premise that transportation furnished thereunder which is international under the terms of the Warsaw Convention will be governed by this international treaty. At no time here involved had the type size of the IATA ticket been specified as a condition of governmental approval. Thus, the construction to be accorded the Warsaw Convention in these cases is a matter of prime concern to IATA and its members.

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[1] Under bilateral air transport agreements to which the United States is a party all agreements reached through IATA's traffic conferences are submitted to the Civil Aeronautics Board for approval. See, *e.g.*, The Bermuda Agreement, TIAS 6019.

The Proceedings Below.

Shortly after takeoff from Shannon, Ireland, while en route from Rome to New York on February 26, 1960, one of Alitalia's aircraft crashed. Each of the passengers aboard was traveling pursuant to a passenger ticket conforming to the requirements of the Warsaw Convention.[2] Most of the tickets had been purchased outside the United States.

Under ordinary circumstances Alitalia's liability in these actions for wrongful death and personal injuries would be limited by Article 22 of the Convention to the sum of 125,000 francs [$8,291.87] for each passenger.[3]

The District Court, although according to one authority "realizing that [it] was breaking a chain of hundreds of precedents,"[4] held that the statements in the tickets refer-

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[2] Article 3 of the Warsaw Convention (49 Stat. 3000; T.S. 876), adhered to by the United States effective October 29, 1934, provides that the passenger ticket shall contain (a) the place and date of issue; (b) the place of departure and destination; (c) the agreed stopping places; (d) the name and address of the carrier or carriers and (e) "a statement that the transportation is subject to the rules relating to liability established by this convention."

The tickets in this case conformed to the Convention's requirements and were also in form approved by the Civil Aeronautics Board. See *Pan American World Airways, et al. Conditions of Carriage*, 24 C.A.B. 575 (1957).

[3] 49 Stat. 3019. By reason of the extraordinary efforts of Mr. Knut Hammarskjold, Director General of IATA, an agreement constituting a special contract under Article 22(1) of the Convention has since been effected between eighty international airlines under which, as approved by the Civil Aeronautics Board effective May 16, 1966, liability on flights serving the United States is increased to proven damages not to exceed $75,000, inclusive of legal fees and costs, and liability up to this limit does not depend on negligence on the part of the carrier. 31 F.R. 7302 (1966). For an account of IATA's part in effecting this agreement see Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 586-596.

[4] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 512, n. 64.

ring to the Convention were in type so small as to be "virtually invisible" and that petitioner had therefor failed to comply with Article 3(1)(e) of the Convention.[5]

The Court of Appeals affirmed, Moore, J. dissenting, 370 F. 2d 508. Ostensibly the majority ruled that "a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice." *Id.* at 514. In actuality the majority simply did not approve the terms of the Convention, labeling them as "arbitrary limitations on liability—which have been severely and repeatedly criticized. . . ." *Id.* at 512.

Clearly as the dissent states "The majority do not approved of the terms of the treaty and, therefore, by judicial fiat they rewrite it." *Id.* at 515.

The Court below would thus rewrite the Convention to make mandatory a larger type size of the statement specified in Article 3 of the Warsaw Convention. Yet the executive branch of the United States Government was unsuccessful in its attempt so to amend the Convention at the Hague Conference in September, 1955.[6]

Reasons for Granting the Writ.

1. The decision below involves the construction of a treaty between the United States and over ninety other nations affecting airline transportation throughout the world.

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[5] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237, 243 (S. D. N. Y. 1966).

[6] Civil Aeronautics Board, Aeronautical Statutes and Related Material 324-66 (1963). The United States has not ratified the Hague Protocol. At the Hague Conference the United States proposed that the Protocol specify that the heading of the statement "be set out in letters of not less than five millimetres high." Volume 1, Minutes, International Conference on Private Air Law, The Hague, September 1955, ICAO Doc. 7686—LC/140, page 124. The Conference rejected this proposal.

As a treaty the Warsaw Convention is a part of the "supreme Law of the Land," U. S. Const. art. VI, §2; *Samann* v. *C. I. R.*, 313 F.2d 461, 463 (4th Cir. 1963); *Wyman* v. *Pan American Airways*, 181 Misc. 963, 43 N. Y. S. 2d 420 (Sup. Ct. N. Y. Co. 1943), *aff'd.* 267 App. Div. 947, 48 N. Y. S. 2d 459 (1st Dept. 1944), *app. den.* 267 App. Div. 983, 49 N. Y. S. 2d 271 (1st Dept. 1944), *cert. den.* 324 U. S. 882 (1945); *Garcia* v. *Pan American Airways*, 269 App. Div. 287, 55 N. Y. S. 2d 317 (2d Dept. 1945), *aff'd.* 295 N. Y. 852, 67 N. E. 2d 257 (1946), *motion den.* 295 N. Y. 981, 68 N. E. 2d 59 (1946), *cert. denied*, 329 U. S. 741 (1946).

It is the purpose of the Convention to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier," 49 Stat. 3000, 3014; T. S. 876.

The uniform IATA ticket here involved was adopted under and in conformance with the Warsaw Convention.[7] It has been approved by the Government of Italy. It was approved by the Civil Aeronautics Board after two and one-half years of study and conferences with members of IATA and other interested persons following public notice, 24 C. A. B. 575, 576. Each flight coupon in Alitalia's ticket clearly sets forth in Italian and English the following statement:

> "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or per-

[7] The ticket is in world-wide use and is subject to approval by all countries whose carriers are members of IATA. No country prior to February 26, 1960, the date of the accident, had required a specific size of type, a proposal rejected at The Hague. See note 6, *supra*.

sonal injury and in respect of loss of or damage to baggage." See 253 F. Supp. at 242.

In approving this specific statement the Civil Aeronautics Board said:

> "The revision to the form of passenger ticket provides for changing the notice of applicability of the Convention which is required by the Convention in the form specified in the Protocol to the convention adopted at The Hague. The new form is much clearer and informative than the one now found on the ticket." 24 C. A. B. at 577.

Whether the Court of Appeals may rewrite the Warsaw Convention by judicial fiat so as to hold invalid thereunder the uniform IATA ticket held by Alitalia's passengers and thereby subject airlines to unlimited liability under the Convention, is a question of importance to the entire air transportation industry. *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297, 300 (1959). An important question of federal law which has not been, but should be, decided by this Court is clearly involved.

Because of its international implications, the final decision in this case will have far-reaching consequences. As stated by the Minister of State Board of Trade of Great Britain "This *Lisi* case is being watched by the British Government and the experts of the International Civil Aviation Organization are watching it with the greatest care. Depending on what the final decision is, we shall have to decide then what action we can take. I am grateful to Hon. Members for raising this matter which is clearly of great importance."[8]

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[8] House of Commons Official Report—Parliamentary Debates—Volume 740, No. 139, Wednesday, 8th February, 1967, 1574/5, 1591.

2. The decision of the Court of Appeals below is in direct conflict with the rules of construction applied to treaties of the United States under the holdings of this Court.

(a) This Court has stated that in ascertaining the meaning of a treaty it may look to negotiations of the parties and their practical construction of it. In *Factor* v. *Laubenheimer*, 290 U. S. 276, 294-295 (1933), this Court said:

> "In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it. *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *In re Ross, supra*, 467; *United States* v. *Texas*, 162 U. S. 1, 23; *Kinkead* v. *United States*, 150 U. S. 483, 486; *Terrace* v. *Thompson*, 263 U. S. 197, 223. And in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight. *Nielsen* v. *Johnson, supra*, 52; *Charlton* v. *Kelley*, 229 U. S. 447, 468."

The decision below has ignored the negotiations and the parties' practical construction of the Warsaw Convention. These factors reveal, without a doubt, that the sanction of unlimited liability was not to be applied to a carrier "if the ticket does not contain the particulars" listed in Article 3(1) of the Convention. Indeed, a proposal to impose such a sanction was deleted from an earlier draft of the Convention after full debate.[9] Thus, it is only where the carrier fails to deliver a ticket to the passenger that the Convention

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[9] The drafting committee at the Warsaw Conference deleted from such sanction the words "or if the ticket does not contain the particulars indicated above". II Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, pp. 100-101 (1930).

would impose unlimited liability. The Court below ignored this clear legislative history.

Nor did the Court below attach any significance to the fact that the delegates to the Hague Conference in 1955, called to review and amend the Warsaw Convention, expressly recognized that the Warsaw Convention did not impose the sanction in Article 3(2) where the ticket did not contain the particulars listed in Article 3(1). Thus, after extensive debate, the Hague Conference adopted a specific amendment to Article 3(2) so as to provide that "if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22".[10] The Hague Protocol however, with its new sanctions, is not applicable to this action.[11]

(b) The Court below also has not applied this Court's holding that treaties cannot be altered by a court upon any notion of equity or general convenience, or substantial justice and that only the parties to a treaty are competent to change it. As stated by this Court in *The Amiable Isabella*, 19 U. S. (6 Wheat.) 1, 7 (1821):

> "We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which

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[10] I, International Conference on Private Air Law, ICAO Doc. 7686-LC/140, p. 134 (1955).

[11] Although the Hague Protocol has not been ratified by the United States and hence there was no requirement here that Alitalia's tickets contain any such notice, each passenger coupon of Alitalia's tickets in these cases also bears language in the form required by Article III, paragraph 1(c), of the Hague Protocol prominently positioned across the entire bottom of the passenger coupon, both in English and Italian.

> they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality."

And most recently stated by this Court in *Maximov* v. *United States*, 373 U. S. 49, 54 (1962):

> "* * * it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expections of its signatories."

As Judge Moore stated in his dissent, "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it." 370 F. 2d at 515. It is clear that the majority have rewritten the Warsaw Convention based upon their "notion of equity" that the limitations of liability are "arbitrary."

Conclusion.

The retroactive rewriting of the Warsaw Convention by the Court of Appeals will affect the outcome in over one hundred cases now pending in federal and state courts throughout the United States.

The decision below directly affects the relationship of all international airlines operating to and from the United States with millions of passengers and the relationship of the United States under the Warsaw Convention with other nations which are parties to the Convention.

The decision of the Court of Appeals may adversely affect the delicate inter-governmental understanding which is necessary to maintain the standard form of airline ticket in world-wide use. The decision of the Court of Appeals has jeopardized world-wide acceptance of uniform travel documents which are based upon the plain meaning of treaties, and which comply with applicable government regulations. The decision could create a precedent under which international airlines and the governments whose flag they fly could not safely rely on United States Government approval of agreements and documents used in international air transportation. In the public interest the decision of the Court below deserves consideration by the highest court in the United States.

For these reasons and the reasons set forth in Alitalia's petition, it is respectfully urged that the petition of Alitalia for a writ of certiorari be granted.

Respectfully submitted,

HAROLD L. WARNER, JR.
25 Broadway
New York, N. Y. 10004
Attorney for the International
Air Transport Association

J. G. THOMKA GAZDIK,
CARL S. ROWE,
PAUL G. PENNOYER, JR.,
Of Counsel.

Certificate of Service.

I hereby certify that copies of this motion and the attached brief have been served upon

Austin P. Magner, Esquire
George N. Tompkins, Jr., Esquire
Counsel for Petitioner
One Rockefeller Plaza
New York, N. Y. 10020

Theodore E. Wolcott, Esquire
Attorney for Respondents
36 West 44th Street
New York, N. Y. 10036

Such service was made by posting the foregoing documents by first class mail.

Harold L. Warner, Jr.

Exhibit 1

IATA MEMBERSHIP AS AT 1st MARCH 1967

Active Members (86)

Aden Airways Ltd. (Fed. of South Arabia)
Aer Lingus Teoranta (Dublin)
Aerlinte Eireann (Dublin)
Aerolineas Argentinas (Buenos Aires)
Aerolineas Peruanas S.A. (Lima)
Aeronaves de Mexico S.A. (Mexico City)
Aerovias Nacionales de Colombia S.A. (AVIANCA) (Bogotá)
Air Afrique (Abidjan)
Air Algérie (Algiers)
Air Canada (Montreal)
Air Ceylon (Colombo)
Air Congo (Kinshasa)
Air France (Paris)
Air Guinée (Conakry)
Air-India (Bombay)
Air Mali (Bamako)
Air New Zealand (Auckland)
Air Vietnam (Saigon)
ALIA—The Royal Jordanian Airlines (Amman)
ALITALIA-Linee Aeree Italiane (Rome)
American Airlines Inc. (New York)
Austrian Airlines (Vienna)
Aviacion y Comercio S.A. (Madrid)

Braniff International Airways (Dallas)
British Eagle International Airlines (London)
British European Airways (London)
British Overseas Airways Corp. (London)
British United Airways Ltd. (London)
British West Indian Airways (Trinidad)

Canadian Pacific Air Lines (Vancouver)
Central African Airways Corporation (Salisbury, Southern Rhodesia)

Exhibit 1 (cont.)

Ceskoslovenske Aerolinie N.P. (Prague)
Civil Air Transport Co. Ltd. (Taipei)
Cyprus Airways Limited (Nicosia)

Delta Air Lines Inc. (Atlanta)
Deutsche Lufthansa (Cologne)
Direcçao de Exploraçao dos Transportes Aereos "DETA" (Lourenço Marques)
Direcçao de Exploraçao dos Transportes Aereos "DTA" (Luanda)

East African Airways Corp. (Nairobi)
Eastern Airlines Inc. (New York)
El Al Israel Airlines (Tel Aviv)
Empresa Consolidada Cubana Aviacion (Havana)
Empresa de Viaçao Aerea Rio Grandense (VARIG) (Porto Alegre)
Ethiopian Air Lines S.C. (Addis Ababa)

FINNAIR—Aero O/Y (Helsinki)
Flugfelag Islands H.F. (Reykjavik)

P.N. Garuda Indonesian Airways (Djakarta)
Ghana Airways Corporation (Accra)

IBERIA, Lineas Aéreas de España (Madrid)
Indian Airlines Corporation (New Delhi)
Iran National Airlines Corp. (Teheran)
Iraqi Airways (Baghdad)

Japan Air Lines Co. Ltd. (Tokyo)
Jugoslovenski Aerotransport (JAT) (Belgrade)

Kingdom of Libya Airlines (Benghazi)
KLM Royal Dutch Airlines (The Hague)
Kuwait Airways Corporation (Kuwait)

Lebanese International Airways (Beirut)
Linea Aerea Nacional (LANCHILE) (Santiago)

The Malta Airlines (Sliema)
Middle East Airlines Airliban (Beirut)
Mohawk Airlines Inc. (Utica, N.Y.)

Exhibit 1 (cont.)

Northwest Airlines Inc. (St. Paul)

Olympic Airways S.A. (Athens)

Pakistan International Airlines Corp. (Karachi)
Pan American World Airways Inc. (New York)
Philippine Air Lines Inc. (Manila)
Polish Airlines "LOT" (Warsaw)

Qantas Empire Airways Ltd. (Sydney)

Scandinavian Airlines System (Stockholm)
Seaboard World Airlines Inc. (New York)
Servicos Aereos Cruzeiro do Sul S.A. (Rio de Janeiro)
Société Anonyme Belge d'Exploitation de la Navigation Aérienne (SABENA) (Brussels)
South African Airways (Johannesburg)
Sudan Airways (Khartoum)
Swiss Air Transport Co. Ltd. (Zurich)

Trans-Mediterranean Airways SAL (Beirut)
Transportes Aereos Portugueses (TAP) (Lisbon)
Trans World Airlines Inc. (New York)
Tunis Air (Tunis)
Turk Hava Yollari (Istanbul)

Union de Transports Aériens (UTA) (Paris)
United Air Lines (Chicago)
United Arab Airlines (Cairo)

Venezolana Internacional de Aviacion S.A. (VIASA) (Caracas)

WAAC (Nigeria) Limited (Lagos)

Exhibit 1 (cont.)

Associate Members (14)

Ansett-ANA (Melbourne)

Chicago Helicopter Airways Inc. (Chicago)
Commercial Air Services (Pty) Ltd. (Johannesburg)
Continental Air Lines Inc. (Los Angeles)
Eastern Provincial Airways (1963) Ltd. (Gander)

Flying Tiger Line Inc. (Burbank)

Linea Aerea del Cobre Ltda. (Santiago)

National Airlines Inc. (Miami)
New York Airways Inc. (New York)
New Zealand National Airways Corp. (Wellington)

Québecair Inc. (Rimouski)

Suidwes Lugdiens (Eiendoms) Beperk (Windhoek, S.W. Africa)

Trans Australia Airlines (Melbourne)

Viacao Aerea Sao Paulo S.A. (VASP) (Sao Paulo)

MOTION FILED

MAR 31 1967

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NOV 9 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1966~~ 70

ALITALIA-LINEE AEREE ITALIANE, S. p. A., *Petitioner,*

v.

JOHN LISI, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Motion of the Air Transport Association of America for Leave To File a Brief as Amicus Curiae

AND

Brief of the Air Transport Association of America as Amicus Curiae

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Air Transport Association
of America
1000 Connecticut Ave., N. W.
Washington, D. C. 20036

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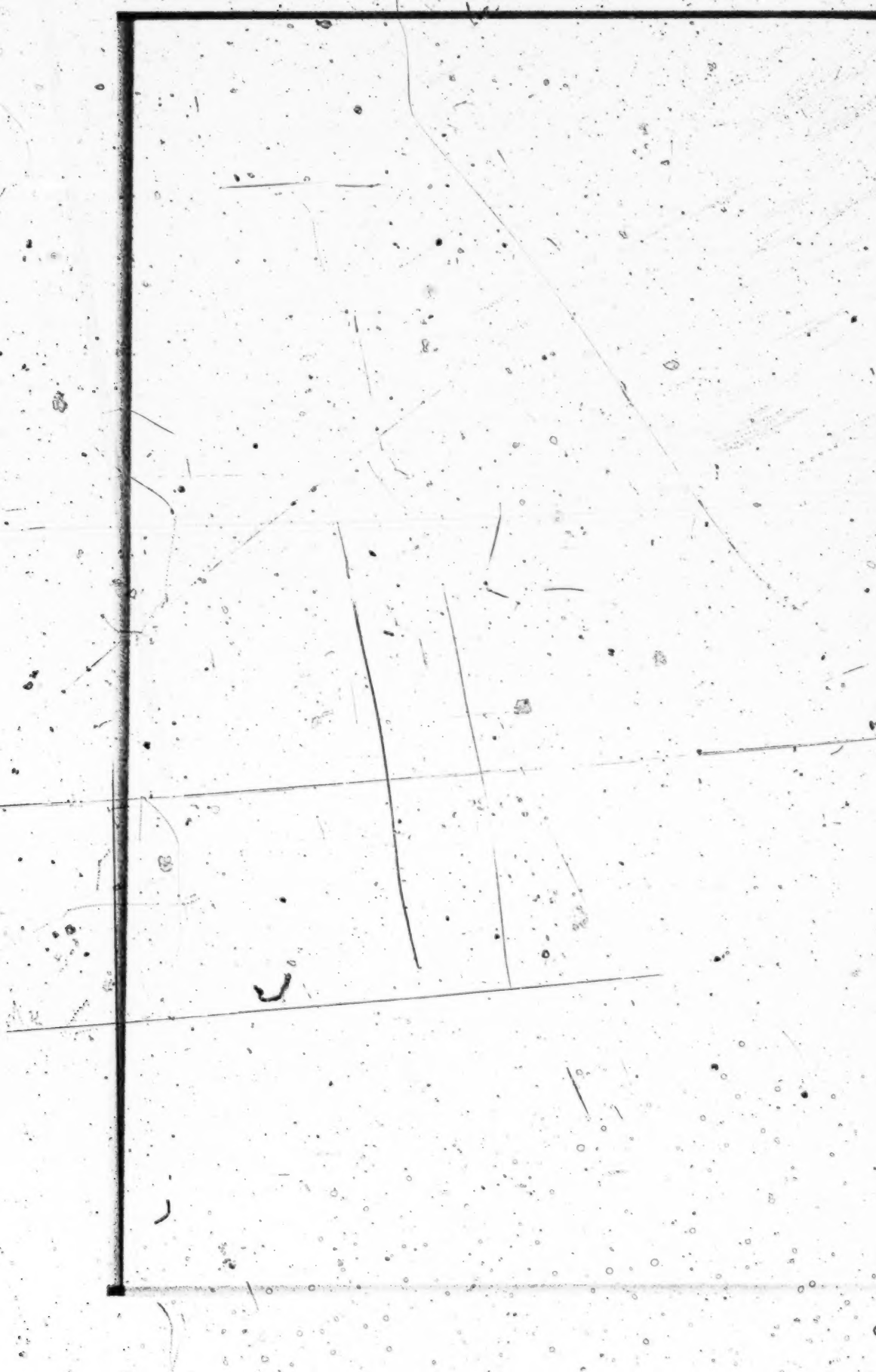

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1169

ALITALIA-LINEE AEREE ITALIANE, S. p. A., *Petitioner,*

v.

JOHN LISI, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

Motion of the Air Transport Association of America for Leave To File a Brief as Amicus Curiae

---

The Air Transport Association of America ("the Association") moves this honorable Court to grant it leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari in the above entitled matter.

Counsel for the petitioner consent to the filing of this brief, but counsel for the respondent has refused consent. Accordingly, leave of this Court is sought under the terms of Rule 42 of the Court's Revised Rules.

The Air Transport Association of America is a voluntary association comprising virtually all of the scheduled, federally-certificated airlines of the United States. The names of the carrier members of the Association are set forth in the Appendix to the brief. As the brief shows, the decision of the court below would have a significant and direct impact on the members of the Association and on the airline industry of the United States in general. The interests of the individual parties to this case are not co-extensive in scope with the far-reaching implications of the questions at issue, and leave to file a brief as *amicus curiae* addressed to these matters should therefore be granted.

Respectfully submitted,

JOHN E. STEPHEN

JOSEPH F. HEALY, JR.
1000 Connecticut Ave., N. W.
Washington, D. C. 20036
Attorneys for the Air Transport Association of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1169

ALITALIA-LINEE AEREE ITALIANE, S. p. A., *Petitioner,*

v.

JOHN LISI, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

Brief of the Air Transport Association of America as Amicus Curiae

---

The Air Transport Association of America ("the Association") respectfully submits this brief as an *amicus curiae* in support of the petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its decision and judgment in the above entitled matter, entered December 16, 1966, 370 F. 2d 508.

I

Interest of the Amicus Curiae

The Association is a voluntary trade and service organization whose membership comprises virtually all of the scheduled, federally-certificated airlines of the United States. The names of the airline members of the Association are set forth in the Appendix to this brief. These airlines carried a total of well in excess of 100-million passengers during 1966.[1]

Many of the members of the Association operate both domestic and international routes; others serve only domestic United States points. Without exception, however, all members of the Association participate in the carriage of international air traffic—over their own international routes, through interline arrangements with other carriers, or a combination of both.

As a result of collective arrangements by the world's airlines, a passenger dealing with one carrier can now move by air on a single ticket between almost any pair of points anywhere in the world. As the Chairman of the Civil Aeronautics Board recently observed:

> "Today, a carrier's ticket stock is freely accepted around the world; baggage allowances are the same in Bangkok as they are in France or Greece; the carriers have a clearing house through which settlement of interline accounts exceeded 2.8 billion dollars last year . . . .
>
> "This uniformity is of immense value to the seasoned, as well as the unseasoned, traveler. He can

---

[1] Civil Aeronautics Board, *Air Carrier Traffic Statistics*, 12 months ended December 31, 1966.

now move between many lands with an ease and smoothness which is truly marvelous."[2]

The key to the airlines' achievement is thus serving the convenience of the traveling public is a comprehensive system of uniform standards, practices and procedures. At the heart of this system is the standardized airline passenger ticket under consideration in this case. The form of this ticket has been approved by the Civil Aeronautics Board, the appropriate regulatory agency of the United States Government, pursuant to its powers under Section 412 of the Federal Aviation Act of 1958, 72 Stat. 770, 49 U.S.C. § 1382. *Pan American World Airways, et al. Conditions of Carriage,* 24 C.A.B. 575 (1957).[3]

In reliance upon such governmental approval and the world-wide acceptance of this standard form of passenger ticket, the members of the Association issue such tickets for the on-line and interline carriage of passengers over their respective routes, as well as honor those issued by other carriers. To the extent that this carriage entails international transportation as defined in the Warsaw Convention, transportation is furnished on the premise that it will be governed by the long-established and well-understood terms of

---

[2] Remarks of Chairman Charles S. Murphy before the World Congress, International Federation of Travel Agents, Athens, Greece, November 14, 1966, p. 7. For a comparative analysis of the difficulties encountered by reason of the necessity for ship passengers to deal separately with each steamship company, see Apter, *Shiplines Need A World Organization,* Travel Agent, April 10, 1964.

[3] The CAB specifically found with regard to the notice of applicability of the Warsaw Convention that: "The new form is much clearer and informative than the one now found on the ticket." 24 C.A.B. at 577.

the Convention. The decision of the court below, in construing the treaty with regard to this very aspect of that uniform system, directly and significantly affects every member of the Association; as, indeed, it affects all elements of the air transport industry of the United States.

II

Reasons for Granting the Writ

The decision below has construed a major, multilateral treaty of the United States in such a fashion as to abrogate one of its principal provisions. This presents an important question of federal law which has not been, but should be, decided by this Court; one that by its very nature also calls for the exercise of this Court's power of supervision over the lower federal courts.

As the preamble to the Warsaw Convention indicates,[4] the fundamental purpose of the treaty is to establish a uniform regime of law applicable to international transportation by air. Some ninety nations have become parties to the Convention since it was first signed in 1929.[5]

---

[4] "[The High Contracting Parties]: Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier, . . . have concluded and signed the following convention:" 49 Stat. 3014 (1934).

[5] U. S. Dept. of State, Pub. No. 8188, *Treaties in Force* 235 (1967). The United States declared its adherence on June 27, 1934, effective October 29, 1934. 49 Stat. 3000, 3013; T.S. 876. Thus the Convention is now a part of the "supreme Law of the Land", U. S. Const. art. VI cl. 2.

(a) The uniform regime of law which the Convention establishes is set forth in plain, uncomplicated terms. The dissent below accurately characterized its provisions:

> "The language of the treaty . . . is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem." 370 F. 2d at 515.

The real problem is not one of understanding what the treaty means or intends; this is clear enough. Rather, it relates to the feeling, obviously shared by the majority below, that the Convention's limitations on liability "which have been severely and repeatedly criticized" are "arbitrary" and give a "one-sided advantage" to the carrier. 370 F. 2d at 512-513. But even if we should assume, *arguendo,* that this criticism of the Convention is justified, the question is whether a court of the United States can judicially rewrite a treaty obligation of the United States so as to cause it to be less offensive to the court's sensibilities on that issue.

The answer, we submit, must unequivocally be in the negative. As Justice Frankfurter once stated with respect to a point which differed from his personal philosophy, "But I must decided this case as a judge and not a legislative reformer." *Burford* v. *Sun Oil Co.,* 319 U.S. 315, 337 (1943) (Frankfurter, J., dissenting).

(b) Petitioner's brief adequately demonstrates the specific ways in which the decision of the majority below is in direct conflict with the express terms of the Warsaw Convention (pp. 8-10), violates the clear

intent of the signatories to this treaty (pp. 10-12), ignores the official position of the United States Government on the subject (pp. 12-13), and is in conflict with every reported authority which has considered the point (pp. 13-14). We will not burden the Court with a repetition of this compelling recitation of the error below, or the equally important matter of the effect of the decision below in compromising the good faith and integrity of the United States in its relations with other nations (pp. 14-15), but will adopt these arguments as our own. Suffice it to note that, as the former Deputy Legal Adviser of the Department of State has commented, the District Court decision which the majority below would affirm involves "breaking a chain of hundreds of precedents."[6] Such action certainly should not be permitted to become final in a case involving a treaty of the United States, without review by the highest court of the land.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN E. STEPHEN

JOSEPH F. HEALY, JR.
1000 Connecticut Ave., N. W.
Washington, D. C. 20036

Attorneys for the Air Transport Association of America

[6] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 512 n. 64 (1967).

APPENDIX

Members of the Air Transport Association of America

*Air Canada
Alaska Airlines, Inc.
Alaska Coastal Airlines
Allegheny Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Bonanza Air Lines, Inc.
Braniff International
*Canadian Pacific Airlines Ltd.
Caribbean-Atlantic Airlines, Inc.
Central Airlines, Inc.
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
The Flying Tiger Line, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Lake Central Airlines, Inc.
Los Angeles Airways, Inc.
Mohawk Airlines, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northeast Airlines, Inc.
Northern Consolidated Airlines, Inc.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pacific Air Lines, Inc.
Pacific Northern Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines
Reeve Aleutian Airways, Inc.
Southern Airways, Inc.
Trans Caribbean Airways, Inc.
Trans-Texas Airways, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
West Coast Airlines, Inc.
Western Air Lines, Inc.
Wien Air Alaska

---

* Associate Member.

Proof of Service

I, Joseph F. Healy, Jr., an attorney for the Air Transport Association of America and a member of the bar of the Supreme Court of the United States, hereby certify that on the 31st day of March, 1967, I served the foregoing Motion of the Air Transport Association of America for Leave to File a Brief as *Amicus Curiae* and Brief of the Air Transport Association of America as *Amicus Curiae* upon each of the parties, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their respective attorneys of record, as follows:

Austin P. Magner, Esquire
George N. Tompkins, Jr., Esquire
One Rockefeller Plaza
New York, N. Y. 10020
Counsel for Petitioner

Theodore E. Wolcott, Esquire
36 West 44th Street
New York, N. Y. 10036
Counsel for Respondents.

Harold L. Warner, Jr., Esquire
25 Broadway
New York, N. Y. 10004
Counsel for International Air Transport Association, *Amicus Curiae*

JOSEPH F. HEALY, JR.

Office-Supreme Court, U.S.
FILED
APR 7 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

RESPONSE IN OPPOSITION TO TWO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

THEODORE E. WOLCOTT
36 West 44th Street
New York, N. Y. 10036
Attorney for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1169

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

RESPONSE IN OPPOSITION TO TWO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

Preliminary Note

The International Air Transport Association (IATA) and the Air Transport Association of America (ATA) have each made a motion for leave to file a brief *Amicus Curiae* on substantially the same grounds. In the interest of brevity the respondents are presenting this single opposing Response to both motions.

Introduction

The motions are made by two trade associations of commercial air carriers, which associations are engaged in advancing the commercial interests of their member airlines. The petitioner, Alitalia Airlines, is a member of IATA. Any suggestions in IATA's application tending to give itself the aura of a public body are misleading.

In fact IATA's attorneys appearing herein also represent various commercial air carriers and liability insurance companies, including TWA and Eastern Air Lines. It should be clear that these motions are motivated by private commercial interest and are not necessarily in the public interest.

The Motions Should Be Denied

It is respectfully submitted that the motions should be denied forthwith for the following additional reasons:

1. The motions do not set forth facts or questions of law that have not been presented by the Petition for a Writ of Certiorari, but merely repeat the Petitioner's arguments. It also may be noted that in successfully opposing a motion in the Court of Appeals below for leave to file an amicus brief, Alitalia alleged that the issues "will not involve the 'difficult legal questions' which were held to warrant intervention." In fact, the decision herein of the Court of Appeals determined a simple issue and merely held that the exculpatory provisions in a ticket delivered to a passenger must be in readable form within the purposes of the convention. The exaggerated stance of "dire consequences" taken by movants is more dramatic than real, particularly since the legibility of the ticket was since improved by order of the CAB in 1963 as observed by the court below at note 10 of its opinion. The issue has become virtually moot.

2. The movants fail to set forth any showing that the facts and issues will not be adequately presented by the highly experienced counsel for Alitalia, who have represented a number of other International air carriers for many years and are thoroughly familiar with industry background and procedures. The interests of the movants

to the extent they are coextensive with the interests of Alitalia will be adequately represented. Sheer numbers and unlimited resources can make no further contribution.

3. There has been no abrogation of any of the Convention's provisions, but merely a reasonable practical construction which incidentally produces a fair result and which cannot be said to be against the public interest.

4. Without the leave of this court as required by the rules, the movants have improperly submitted briefs on the main issues as part of their motions. It is respectfully submitted that these briefs should be stricken. The Response herein has not attempted to answer the briefs for the above reason.

CONCLUSION

Wherefore it is respectfully submitted that the motions be denied.

Respectfully submitted,

THEODORE E. WOLCOTT
36 West 44th Street
New York, N. Y. 10036
Attorney for Respondents

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APR 27 1967
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1167~~ 70.

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

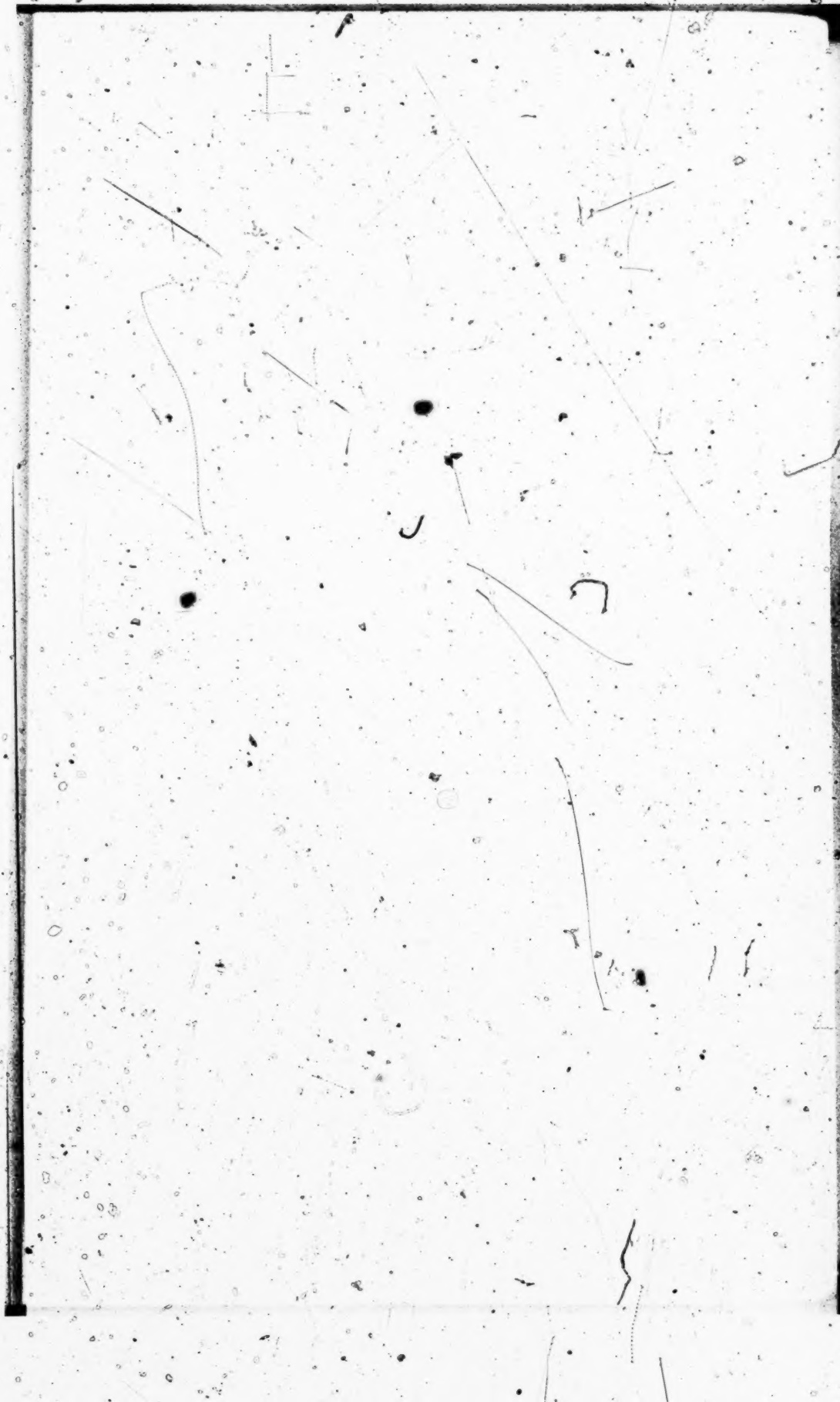
—v.—

JOHN LISI, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THEODORE E. WOLCOTT
36 West 44th Street
New York, N. Y. 10036
Attorney for Respondents



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1169

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI*

Question Presented

Whether Petitioner, which claims that no notice whatsoever of limitation of liability under the Warsaw Convention need be contained in the passenger ticket, has presented sufficient reasons for issuance of a writ of certiorari, particularly when the narrow issue involved has become virtually moot?

Statement of the Case

These are actions for wrongful deaths and serious personal injuries variously suffered by respondents and their decedents (collectively referred to herein as "plaintiffs") arising out of an airplane crash on February 26, 1960 on

---

*Emphasis wherever the same appears is our own. References to the Appendix to the Petition are noted as "App. B."

take-off from Shannon Airport, Ireland, in the course of a transatlantic flight from Rome to New York on an aircraft owned and operated by petitioner (hereinafter referred to as "Alitalia"). In its answers to the complaints herein, Alitalia uniformly set up affirmative defenses to the effect that the transportation herein was subject to the Warsaw Convention (hereinafter sometimes referred to as "Warsaw") and to the limitation of liability thereunder in the maximum sum of $8,300.

Plaintiffs moved in the District Court for partial summary judgment striking the defenses on the ground that there was no delivery of a ticket to the passengers containing readable and intelligible notice of limitation of liability as required by Warsaw and under American law and that therefore the small damage limit of liability could not be applied. Alitalia claimed that the ticket need contain no notice, nor any other particulars and, in effect, could be blank.

The Decision of the District Court

The decision of the District Court (App.B, p. 43, 253 F. Supp. 237) in granting the motion and striking the defenses of limitation of liability, reproduced the so-called ticket, baggage check and coupon which eloquently illustrated the accurate and descriptive language of its opinion (App.B, pp. 49, 50). Judge MacMahon held that pursuant to the provisions of Warsaw, prior to departure, a ticket and baggage check must be delivered which notifies the passenger that the provisions of Warsaw which exclude or limit liability are applicable; that the statements in the so-called ticket were printed in such a manner as to be virtually unnoticeable and unreadable and that as a matter of law no delivery of a ticket, as required by Warsaw, was made; and further that the conditions were camouflaged in:

". . . Lilliputian typography, . . . which must be read through 'a magnifying glass' . . . (and) is at war with the intent of the Convention" (App.B, p. 51).

". . . Manifestly, if the ticket and check delivered by the airline fail to notify the passenger that the exclusion or limitation provisions of the Convention are applicable, the passenger is not afforded a reasonable opportunity to protect himself by deciding not to take the flight, entering in to a special contract with the carrier (article 22(1)), or taking out additional insurance" (App.B, p. 46).

The District Court interpreted Warsaw within its framework and cited and applied established principles of law.

The Decision of the Court of Appeals

The Court of Appeals below affirmed the District Court, two-to-one (App.B, p. 13). The majority fully agreed with the District Court that Alitalia had failed to deliver to the passenger a readable and intelligible ticket complying with the Warsaw Convention. It did not hold, as inaccurately stated by Alitalia (Petition p. 6), that "prior actual notice" of limitation of liability must be given to the passenger; nor did the court rule further than the application of Article 3 of the Convention.

The court incidentally noted the Convention's arbitrary limitations on liability, "which have been severely and repeatedly criticized" are advantageous to the carrier but that "the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is

given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit" (App.B, p. 20). The court noted that in this connection Article 3 should be read together with Article 22(1); and that its decision was generally consistent with the position of the United States and the C.A.B.

The court below agreed that the District Judge "appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print'." The court also observed in a footnote no. 10 that even if a passenger were able to read the fine print "it is highly questionable whether he would be able to understand the meaning of the language" (App.B, p. 22).

The Dissenting Opinion

In his dissenting opinion, Judge Moore perforce assumed a series of extreme postures. While agreeing that the ticket provisions were "in exceedingly small type", Judge Moore expressed the extreme view that adequacy of notice on the ticket was immaterial; that even if a "one-sided advantage is being taken of the passenger" he was not protected by Warsaw, and, in any event, apparently should not be protected by our courts. Judge Moore attempted to reinforce his argument by erecting a straw man of an "actual notice" ruling which, in fact, had not been urged by the plaintiffs or held by the courts below. It should be stated that, except for a slight increase made by the Hague Protocol (not accepted by the United States) no "substantial revisions upward . . . have been made by treaty", as claimed by Judge Moore. (These increases have been by private agreement of the air carriers in order to induce the United States to withdraw its denunciation of Warsaw (see footnote 7, majority opinion, App.B., p. 20).

Nor did the courts below attempt to revise the limits as suggested by Judge Moore. They were concerned only with and ruled only upon the adequacy of notice of the limitations of liability as expressed on the ticket. In no way did they rewrite the convention but merely construed sections pertinent to the point at issue.

Judge Moore took the extreme and unsupported position that the convention so clearly stated that no notice need be contained in the ticket (and that any kind of ticket could be delivered to the passenger), that there was no room for construction; that construction meant interference and "judicial treaty-making." Judge Moore chose to ignore the well-established rule that a treaty, like any other federal statute, is subject to judicial construction and application. It should be observed that Alitalia has plucked out of its doubtful context a few selected phrases from the dissent and made them the central structure of its application.

Rehearing Was Denied *In Banc*

Alitalia's application for a rehearing was denied (App.B, p. 36). Alitalia also made an application for rehearing to the entire court *in banc*. This was also denied by a two-thirds majority of six to three (App.B, pp. 39, 40). There can be no question that the issues herein have been thoroughly reviewed.

The So-Called "Questions Presented" by the Petition, Numbered 1, 3 and 4, Are Not Here Involved, Are Improper and Should Be Disregarded

Alitalia has improperly injected non-existent facts and issues which were not present below and are not before this court. To the extent also that Alitalia has attempted

to further intertwine these into and color its petition, they should be there disregarded.

A. *As to so-called "Question" No. 1:* At no time did the plaintiffs in their motion papers for partial summary judgment or in their arguments or briefs to the District Court or to the Court of Appeals contend that "actual notice" of the limitation of the air carrier's liability to the passengers must be given to the passenger before the limitation becomes binding. Nor did the courts below treat this as a contention or issue nor so hold. Plaintiffs' claim was that the airline must deliver to the passenger a ticket containing clear and readable notice to the passenger that his transportation is subject to the liability limitations of the Warsaw Convention (R.16a, App.B, p. 44). Accordingly, Question No. 1 of the petition is contrived and non-existent and should be disregarded.

B. *As to so-called Question No. 3:* It should be noted that only the adequacy of the ticket as such was put into issue in the District Court by the plaintiffs' moving papers (R.13a, 15a, 17a, 26a, 29a) as further certified by plaintiffs' attorney (R.31a, 33a), and also as certified by Alitalia's attorney (R.34a). The plaintiffs did not put into issue the adequacy of the baggage check (the values there involved are minimal) and any attempt by Alitalia on this application to raise the issue of the adequacy of the baggage checks is improper and is a transparent attempt to support a claim that there is a conflict among the Courts of Appeal on a point not at issue here. There is a vast difference in the basic approach of the courts to the question of limitation of liability for wrongful death or personal injuries and in their approach to the limitations of liability for loss of baggage or personal property. Accordingly, Question No. 3 of the petition is contrived and non-existent and

should be disregarded, and any reference below to the baggage checks be treated as dicta.

C. *As to so-called Question No. 4:* The "readability" of the conditions of the passenger ticket was conceded by both sides to be a question of law. At no time in its papers, briefs or argument to the courts below did Alitalia claim that this was a jury question. It treated the same as a question of law. See also the majority opinion in which this fact was specifically noted at footnote 9 and in which it was stated: "The parties have agreed that this is a question of law for the court to decide" (App.B, p. 22). In fact, Alitalia's position in its brief to the Court of Appeals below was that as a matter of law, the ticket need not contain any information; and that it could deliver any kind of ticket virtually amounting to a blank "Boarding Pass", upon which event the limitations of the Convention would automatically apply in a Warsaw situation. Point I of Alitalia's brief to the Court of Appeals read:

> "The Sanction in Article 3(2) Applies Only Where No Passenger Ticket is Delivered and Does Not Apply Where Any of the Prescribed Particulars are Omitted from the Passenger Ticket."

Accordingly, Question No. 4 of the petition is contrived, non-existent and should be disregarded.

REASONS FOR DENYING THE PETITION

Summary of Argument

The Court of Appeals followed a well established principle of construction of treaties and has given Article 3 a reasonable construction within its context and history that is incidentally fair to both the passenger and the air carrier. The decision is consistent with the overall pattern and intent of Warsaw to give the passenger clear and readable notice in the ticket of its exculpatory provisions. The decision observes basic legal principles and is in accord with reported authority. It is in accord with the policy of the United States Government and of the Civil Aeronautics Board's own regulations requiring clear and adequate notice. It does not become a "virtual denunciation" of the treaty merely because it holds that the terms and conditions of the ticket should be in readable form, in contrast to Alitalia's position that the ticket need contain no notice and can be practically blank.

In April 1963 the Civil Aeronautics Board again criticized the unreadability of the Warsaw tickets and directed that notice be given to passengers in prominent and clear type and language. (See Opinion below, footnote 10.)

There is no conflict with a decision of another court of appeals on the same matter, the only issue herein being the readability of the ticket as such. There was no denial of a jury trial, the parties having agreed this was an issue of law. Furthermore, the courts below held that a jury could not have reasonably found that the ticket gave the passenger the required notice.

In 1965, because of general dissatisfaction with the treaty, the United States Government gave notice of with-

drawal, effective in six months, which notice was withdrawn on the last day when the principal international air carriers agreed to raise the limits to $75,000 (Opinion below, footnote 7, App.B, p. 20). It is respectfully submitted that under the circumstances, in view of the corrective measures with respect to notice taken since this accident by the Civil Aeronautics Board (apart from the increases agreed to by the airlines), the issue herein has become virtually moot.

Neither the Court of Appeals nor the District Court departed herein from the accepted and usual course of judicial proceedings. No reasons exist for the issuance of the extraordinary writ of certiorari.

I.

The decision below is amply supported by authority. Prior readable and clear notice in the ticket of limitations of liability is required by the Warsaw Convention.

Alitalia has again taken the stance that no notice of any kind need be given to the passenger, and that it may decline any kind of ticket, which could be a virtually blank ticket or "boarding pass." Petitioner would have the court believe that this is all the Convention requires of the carrier, before it can escape liability for its negligence at little price.

The decision of the Court below follows the principles and reasoning in *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (C.A.2), *Warren* v. *Flying Tiger Line, Inc.*, (1965 C.A.9) 352 Fed.2d 494, and *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804 (C.A.2) and is in accord with the basic principles of American law requiring reasonable notice in a ticket where limited liability for injury to the passenger

is sought to be imposed, notwithstanding the negligence of the carrier.

The principle is well established that a party seeking to impose an unusual condition, such as a limitation of liability which is basically repugnant to our American system of jurisprudence, has the burden of showing that the transaction comes within the exception to our prevailing rule of law of unlimited liability for negligence. See *Santa Fe Ry.* v. *Grant Bros.*, 228 U.S. 177, 184 (1931); *Oceanic Steam Navigation Co.* v. *Corcoran*, 9 F. 2d 724 (C.A.2, 1925); *The Majestic*, 166 U.S. 375, 385; *Conklin* v. *Canadian Colonial Airways, Inc.*, 266 N.Y. 244; *Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34; *Hawson* v. *Pennsy. R.R. Co.*, 48 N.Y. 212. Compare insurance contracts, which are construed against the insurance company; *Lachs* v. *Fidelity & Casualty Co. of N.Y.*, 306 N.Y. 357; *Hartol Products Corp.* v. *Prudential Insurance Co.*, 290 N.Y. 44, 49.

In the course of its analysis of the convention, the court below stated:

> "Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra.*
>
> This is not the first occasion on which we have been called upon to interpret the language of the Convention's delimiting provisions. For example, in *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), cert. denied, 382 U.S. 816 (1965), we were asked to decide whether presenting a ticket to a passenger after he boarded the carrier's plane, constituted a 'delivery' within the meaning of Article 3(2). We stated:
>
> We read Article 3(2) to require that the *ticket be delivered to the passenger in such a manner as to*

afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. Such self-protective measures, could consist of for example, deciding not to take the flight, entering in a special contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that 'the carrier and the passenger may agree to a higher limit of liability,' (Article 22 (1)) and there would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket *be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.*" Id. at 856-57 [Emphasis added].

We held, accordingly, that the delivery was inadequate and the Convention's fixed limits of liability were not available."

The court below concluded that the notice on the ticket was illegible and unreadable:

"Judge MacMahon appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that their presence is concealed."

II.

The requirement of adequate notice in the ticket is inherent in the overall pattern of Warsaw.

The structure of Warsaw, which is a private, rather than a public, international treaty, is skeletal. "The Warsaw Convention is by no means perfect. Either deliberately or by omission, a number of questions were left open which, according to the background drafting documents, would presumably be resolved by national law." (Sand: Air Carrier Limitation of Liability 28 J. Air L. 260, 267 n.67; article cited in Opinion below, note 7, App.B, p. 20). As the above shows, and the following discussion establishes, that with respect to uniformity, it suggests at best a uniformity of principle, leaving individual applications and situations to the signatory power's own law. Compare Articles 21, 24(2), 25(1), 28(2) and 29(2).

A. *"Scope-Definitions" and Other Related Articles of the Convention:*

An examination of the traffic document articles in relation to the Convention as a whole establishes that the ticket must contain certain essential information including notice of limitation of liability and cannot be a mere "Boarding Pass". Warsaw must be read as a whole.

In the "Scope-Definitions" of Article 1, it is provided that:

> "(2) . . . 'international transportation' shall mean any transportation in which, *according to the contract made by the parties,* the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, . . ."

"(3) Transportation . . . by several successive air carriers shall be deemed, . . . to be one undivided transportation, if it has been *regarded by the parties* as a single operation . . ."

Obviously, the reference to "contract" necessarily refers to the ticket since only from this document can it be determined what the territories are that are involved, the place of departure, and the place of destination in order to determine whether it is Warsaw transportation. The "contract" (or meaningful) ticket concept is repeated in "Transportation Documents", Articles 3, 4, 8 and in the venue provisions of Article 28, and in the successive carriers provisions of Article 30, all of which presuppose the existence of an intelligible ticket.

Consistent with this scheme, are the provisions of Article 22(1) where it is stated "Nevertheless by special contract, the carrier and the passenger may agree to a higher limit of liability." This provision would be meaningless if the passenger had no prior notice on the ticket that the carrier's liability "was subject to the rules relating to liability established by this convention." This aspect was stressed by the Court of Appeals below.

B. *The Difference in Drafting Between Article 3 and Articles 4 and 8 Is Consistent With a Notice Requirement:*

(1) As to Article 3 (Passengers)

Article 3 provides that, "the carrier must deliver a passenger ticket which *shall* contain the following particulars". The particulars for the most part are details of the contract requirements of Article 1. For example,

(a) "The place and date of issue"

(b) "The place of departure and of destination"

(c) "The agreed stopping places" (Under Article 1 it would be necessary to either (b) or (c) as a means of determining the international character of the transportation.)

(d) "The name and address of the carrier or carriers" (The application of Article 28 would require the ticket to contain items (a), (b) and (d) in order to determine where the action may be brought.)

(e) "A statement that the transportation is subject to the rules relating to liability established by this Convention".

(The Court is respectfully referred to Point I *supra.*) Our comment with respect to Article 22(1) and the overall structure of the convention underlines the importance of item (e) above. See the opinion below and *Mertens* and *Warren,* (*Supra,* p. 9).

Subdivision (2) of Article 3 provides as follows:

> "(2) The absence, irregularity or loss of the passenger ticket shall not effect the existence or validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

This language eliminated the possibility of the carrier being penalized by some slight clerical error or other minor irregularity, or by the omission of an item non-essential to the particular transportation, or by the ticket being lost or not presented ("absence") at embarking. A greater flexibility was achieved in relating an omission on the ticket to its

materiality in a given situation. See discussion of its history at Point III hereof, *infra.*

It was thus left to the national courts when the situation arose, as it did in the *Mertens, Warren* and in the instant case, to state what constitutes delivery of an adequate ticket under the circumstances. (Sand: *op. cit. supra,* p. 12)

(2) As to Articles 4 and 8 (baggage and goods):

In the transportation of unaccompanied baggage or goods, on the other hand, certain specific particulars are necessarily explicitly stated to be minimal. In the case of baggage (Article 4), these particulars are a means of identifying the baggage by requiring the number of the passenger ticket to be written on the baggage check, and, in order to determine the dollar amount of liability by requiring the number and weight of the packages to be listed. The accompanying mandatory statement that the transportation is subject to the limitations of liability established by the Convention is particularly necessary when read with Article 22(2) which describes the method of computing the dollar amount of damages in the case of baggage or goods. Article 8 (the airway bill) is for or similar reasons detailed as to the nature of the goods, the international character of the transportation, and the weight and the quantity of the packages and notice of limitation in order to compute dollar amount of damages under 22(2).

III.

The history of Article 3 shows that it was designed for flexibility and the application of national law.

A.

Alitalia contends that Article 3 is so clear on its face as to require no further reading. Yet it refers to so-called legislative history to clarify it (Petition pp. 8, 10). It is submitted that this history, to the extent pertinent, supports respondent's position that greater flexibility was desired by the draftees in the application of Article 3.

Alitalia's stress on the drafting change made in the original Article 3 by the Greek proposal is misplaced. The Greek proposal did not intend to remove sanctions as against a ticket omitting essentials but merely was designed to protect the carrier against minor errors by its clerks in making out a ticket and in omitting what might later turn out to have been merely a non-essential item that did not effect the transportation nor "injure the passengers", as noted in the *Grey* case. This is demonstrated by Goedhuis' own report of the proposal of the Greek delegate at p. 152 of his book. We quote:

> "With regard to this article, the delegate of the Greek Government at the Warsaw Convention pointed out that the sanction provided in the case under (2) would be much too rigourous *if the carrier had omitted to put down the place of issue or the place of destination, or his name and address, just through carelessness.* How could this severe sanction against the carrier be justified *if the omission was of no interest to the other party and of no injury to him?*"

Article 3 was designed in such a manner as to allow for the operation of local national law to determine as here whether an omission on the ticket was material.

B.

The defendant has attempted to make capital out of the fact that the Hague Protocol amending the convention (not adhered to by the United States) makes a drafting change in Article 3, specifically eliminating the limitations of liability for failure to state essential items in the ticket.

A reading of the minutes will show that the change in the Hague Protocol as to notice in Article 3 was due to the realization that the technique of leaving the remedy to local law may have created differences of application and approach in various national courts. There was almost unanimous agreement of the Hague delegates that notice to the passenger should be made more explicit. It was thus decided to adopt the American suggestion to specifically provide for uniformity among all the document provisions so that the remedy would be universal. What was predicted by the American delegates (remarks of Mr. Calkins on page 116 of Minutes of 1955 Hague Conference, ICAO Document #7686-LC/140) and others as to the requirements of the American courts with respect to notice has come to pass in *Mertens, Warren* and *Lisi.* The decision below is consistent with the position of the United States and the CAB on the issue of adequate notice, (*infra* p. 18).

C.

It may be observed that the principle of "practical construction by the parties" should refer to the signatory powers rather than the airlines. It cannot be used to solidify a one-sided ticket imposed upon the unsuspecting passenger

by the airline. Here consider the repeated criticisms of the CAB.

The cases cited at p. 5 of the petition do not contravene this principle. In fact they support it. They all uniformly agree that "It is a general principle of construction with respect to treaties that they shall be liberally construed." *DeGeofrey* v. *Riggs*, 133 U.S. 258, 271.

IV.

The decision below is in accord with the position of the Civil Aeronautics Board and United States public policy.

A.

Alitalia claims at page 16 of its brief that the passenger tickets herein were approved as to form and content by the C.A.B. citing 24 CAB 575 (1957). In that proceeding, the C.A.B. limited itself to approving the interline resolutions and agreements, and it specifically criticized the ticket in its Order E-11024 appended to its decision, expressly observing also at p. 577 that it did not necessarily approve of the legal effect of the ticket.

The more recent policy of the C.A.B. is contained in its notice of proposed rule making, Economic Regulations, Docket 14411, dated April 1, 1963, (extensively commented upon by the court below in its opinion note 10, App.B, p. 22 *et seq.*)

As to the small print on the face of the ticket, the C.A.B. said:

> "It appears to the Board that *this notice may be inadequate in two major respects*: First, the ticket by no means the most effective instrument for advising a

passenger of a limitation of liability. There can be no assurance that a passenger will read his ticket at all or if he does, that he will read it under such circumstances as will enable him to realize the significance of the notice provision and take such protective action as his circumstances require. The type in which the *notice is currently printed on the ticket is too small* to alert the passengers to the importance of the matter. *Second, the fact of greater significance to the passenger, namely, the amount of limitation on liability for death or injury does not appear in the notice.*"

In its Order No. E-1944, Docket 14411, adopted by the C.A.B. on April 1, 1963, referring to agreement C.A.B. No. 10559, R-2, relating to the form of passenger ticket and baggage check, the C.A.B. said:

"Insofar as applicable to the notice provisions now appearing in the ticket, the Board stated (1) *the type in which the ticket notice is currently printed on the ticket is too small to alert passengers to the importance of the matter,* and (2) that the monetary limit of liability for death or injury does not appear in the notice. Therefore, in conjunction with the proposed amendment of Part 221, the *Board will re-examine its approval of the IATA Agreement* relating to the form of tickets and baggage checks (Agreement No. CAB 10559 R-2)."

This order refers to previous Order E-11024, which had been adopted February 21, 1957, contained in 24 CAB 575, (*supra,* p. 18).

In the previous referred to Docket 14411, dated April 1, 1963, the C.A.B. also proposed to add a new paragraph (j)

to Title 14, C.F.R. §221:38 which now provides for a notice of limitation of liability for injury or death under the Warsaw Convention, specifically stating:

> "Notwithstanding the provisions of the paragraph (h) of this section, each air carrier and foreign air carrier shall publish in its tariffs a provision stating whether it avails itself of the limitation on liablity to passengers as provided in Article 22(1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention including the amount of the liability limit in dollars. Where applicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added."

It is clear from the foregoing that the C.A.B. had not approved this ticket as such, but had found the same faults with it as have our courts in *Mertens, Warren* and *Lisi.*

B.

The exaggerated posture of "treaty repudiation" taken by Alitalia and of alleged adverse foreign repercussions has no relation to reality. In the first place, to require a clear and readable notice of limitation of liability to be placed on a passenger's ticket is hardly radical or earth-shaking and is in healthy contrast to Alitalia's position that the ticket need contain no notice and be merely a "boarding pass."

Alitalia's attorneys (who also are attorneys for BOAC largely owned by the British Government) improperly refer to and incorporate a House of Commons debate as Ap-

pendix C, which is irrelevant and should be disregarded. They stress a question raised in the House of Commons as to the effect of the *Lisi* decision. With due respect, it is evident from the extensive minutes that there was little understanding of the narrow scope and effect of the *Lisi* decision. There is no explanation of the circumstances prompting the question. But the debate nevertheless revealed general dissatisfaction with the low limits of recovery; acknowledgment that the Warsaw limitation "has worked out to the advantage of the carriers throughout the world" (p. 60); that "there should be a prominent notice, not just a fine print statement"; that a notice should be "a reasonable person's notice" (p. 66).

On the other hand, Alitalia failed to refer to the prolonged discussions in our Senate, newspapers, magazines and other public media, showing disapproval of the Warsaw Convention as one-sided, inequitable and un-American and which in large part called for our withdrawal, to which our Government ultimately responded. (See opinion below, note 7).

V.

There is no conflict with another Appeals Court as to the issue here involved.

As initially stressed at page 9 hereof, the motion for summary judgment was concerned solely with the sufficiency of the passenger tickets and not with the baggage checks. Any comment by the court below that may have included the baggage checks was unnecessary to its decision and should be regarded as dicta. The *Seth* case, decided by the First Circuit, is concerned solely with the adequacy of the baggage check, which is not in issue here.

The *Seth* case involved baggage and goods and not passengers. Whatever its shortcomings, it is consistent with the general American rule recognizing the principle of limited liability or released value in the case of baggage or cargo. On the other hand, there is no such American rule applicable to death or injury to passengers. *Conklin* v. *Canadian Colonial Airways, Inc.*, 266 N.Y. 44. The petition makes a transparent attempt to create a synthetic conflict of decisions on the same matter.

VI.

The parties agreed to treat the issue as a matter of law and there was no denial of a jury trial.

This has been sufficiently adverted to at page 7 hereof. Furthermore, the Court of Appeals (and District Judge MacMahon) held:

> "We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice."

The *Atlantic* and *Gulf* case cited by Alitalia at p. 17 of the Petition merely held that the Court of Appeals should not have reversed a verdict by the jury which was the trier of the facts submitted to it.

VII.

The foreign authorities* and cases cited by Alitalia are not in point.

At page 14 of its brief, Alitalia refers to books written by Goedhuis, Shawcross and Beaumont and Drion. It is questionable whether they would qualify as disinterested legal scholars. Alitalia cannot deny that they have variously served principals (whose interests as to Warsaw were in limiting liability), such as International Airlines, or their European Government owners, or their insurers.

Dr. Goedhuis' book was published in 1937 when international air transportation was in its infancy and court decisions were sparse. As its title suggests, Goedhuis was primarily concerned with comparing the air legislation of various countries with the Warsaw Convention in an effort to expand the Convention's acceptance. As stated in his preface, his book was an outgrowth of his report to the International Air Traffic Association, the purpose of which was to push the adoption of the Warsaw Convention by all countries.

H. Drion, at one time, was an attorney associated with KLM Airlines. His book, published in 1954, could not have considered the *Mertens* and *Warren* decisions.

Shawcross and Beaumont's long association with British air carriers or their insurance carriers is well known. Unfortunately, the latest edition of this book does not contain any reference to or discussion of *Mertens, Warren* or *Eck,* the only other decisions which have any real relevance to the issues involved herein.

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* These observations which were made in plaintiff's brief to the Court of Appeals were not challenged by Alitalia.

The *Grey* case cited at pages 9 and 14 of Alitalia's petition was distinguished by the Court below in this and in the *Mertens* case. *Grey* was solely concerned with whether the omission in the passenger ticket of certain "agreed stopping places" as provided in Article 3(1)(c) was fatal to the carrier. This relatively minor omission obviously did not affect the international character of the transportation in its flight from New York to Mexico, with the intermediate domestic stops of Washington and Dallas. Nor did it have any causal connection to the issue of notice to the passenger of limited liability under Warsaw as here.

The *Preston* case cited by Alitalia at page 14 of its Petition was concerned only with omission of certain intermediate "agreed stopping places" en route from London to Kenya and suffers from the same inappositeness as *Grey* which it follows. The *Montague* case cited at page 14 was concerned with goods. The issue of notice or readability was not present in the lower court *Eck* decision and the *Manufacturers Trust* case was sent back for trial on the issue of notice.

The law review article by Lowenfeld and Mendelsohn (Petition p. 13) deals mainly with the events leading to the denunciation by the United States and its later withdrawal. The off-hand and mistaken guesswork as to Judge Macmahon's reasons for certifying an appeal is demonstrably groundless particularly in light of the subsequent Court of Appeals affirmance.

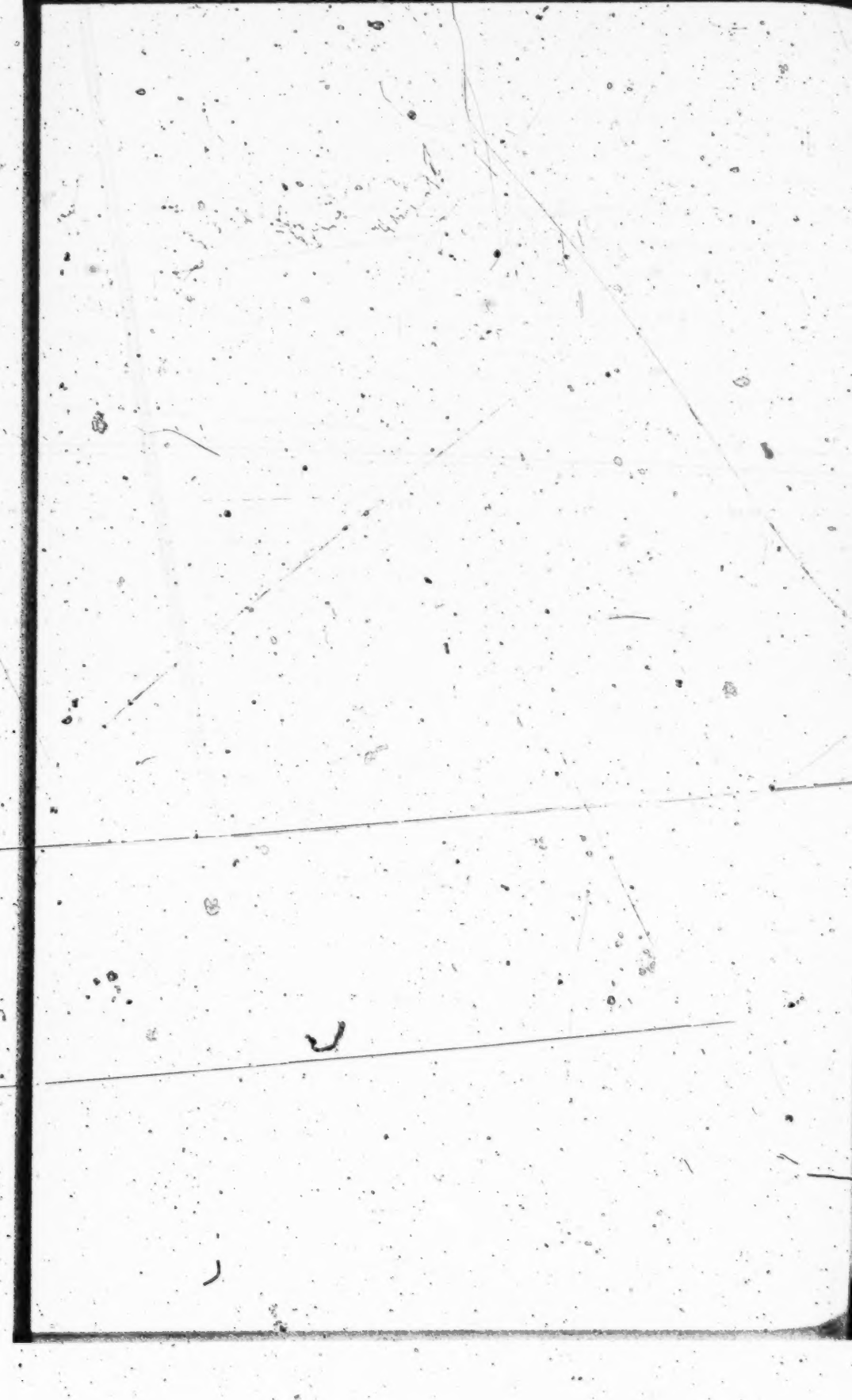
CONCLUSION

Petitioner's application is an artful attempt to create large issues which are in fact non-existent. There are no issues requiring the Court's attention.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THEODORE E. WOLCOTT
36 West 44th Street
New York, N. Y. 10036
Attorney for Respondents



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

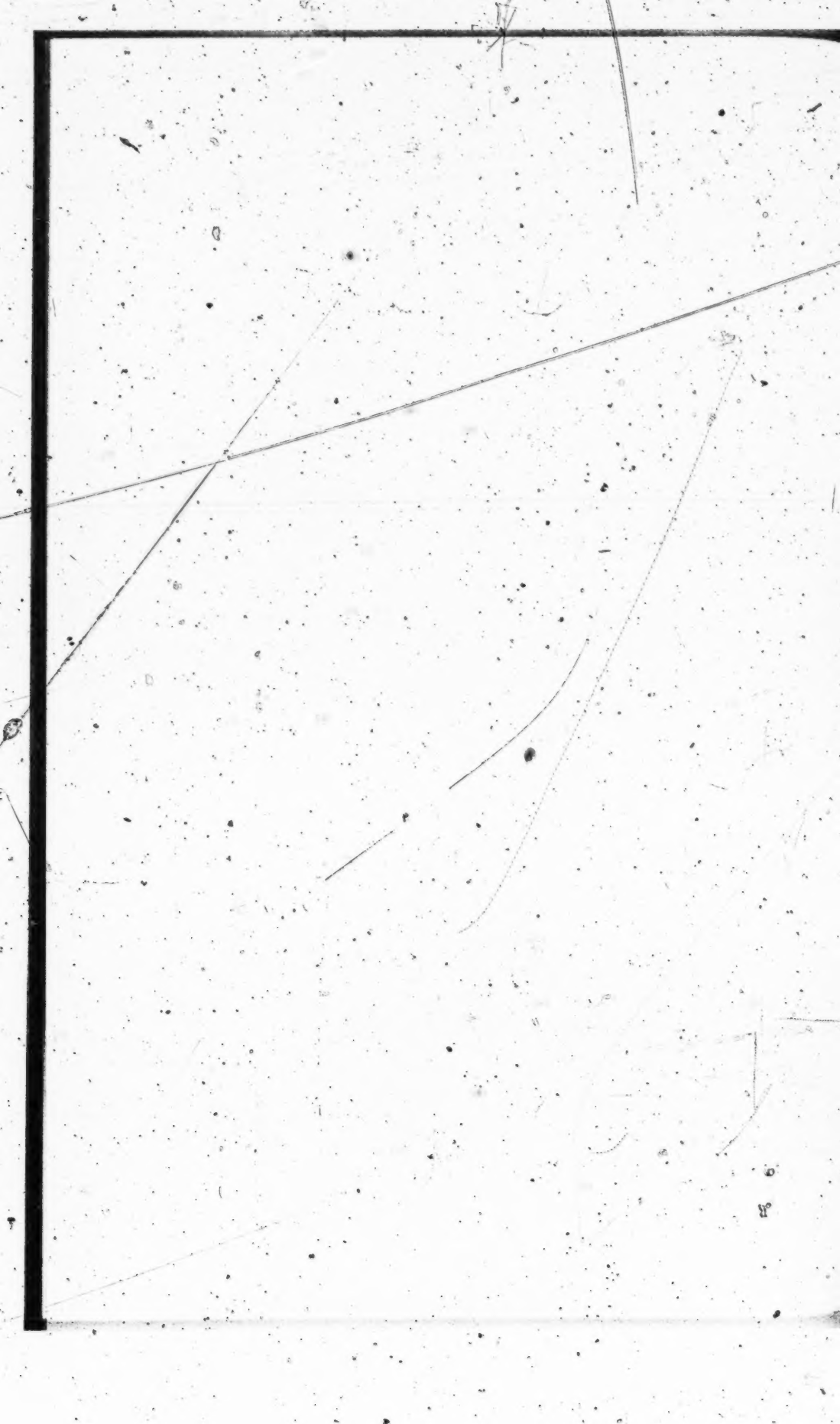
—v.—

JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020



IN THE

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ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This reply brief is necessary because of outright errors in respondents' brief.

I.

Respondents have conceded in the conclusion to their brief that the questions presented by the petition are "large issues." Respondents, however, argue that these issues are nevertheless nonexistent. They assert that the case involves merely a mundane question of fact regarding the readability of the notice in the ticket.

The majority decision of the Court below would not be a virtual denunciation of the treaty if it only held that the notice was not readable. If the question of readability were all that is involved, petitioner might readily agree

that this question is not sufficiently important to warrant review by this Court. However, the basic question is not the readability of the notice in the ticket, but whether the sanction of Article 3 (2)[1] applies if the notice is not readable.

The express language of the treaty says NO, the sanction does not apply. Both Courts below have held that the treaty says YES, the sanction does apply. Both the District Court and the majority of the Court below have held contrary to the plain language of the treaty, and the clearly expressed intent of the drafters of the treaty. Their decisions are barren of any relevant authority of any kind. To repeat the words of Judge Moore in his dissenting opinion:

> "The majority in their opinion indulge in judicial treaty-making.
>
> * * * * *
>
> "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability." (R. 74a).

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[1] "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his ability." 49 *Stat.* 3015.

II.

Respondents have misrepresented the position of the Civil Aeronautics Board (the Board) with respect to the sufficiency of the form and content of the standard IATA passenger ticket and baggage check.

The Board expressly approved the form and content of the standard IATA passenger ticket and baggage check in 1957.[2] This document had been drafted in both form and content so as to eliminate legal and policy objections expressed by the Board to the airline ticket previously in use.[3] The Board's own staff was instrumental in re-drafting the ticket.[4] Respondents have seized upon the Board's reservation as to one provision of the ticket,[5] irrelevant herein, and mischaracterized same as a reservation by the Board as to the whole ticket.

The Board has not ordered any change in the form or content of the passenger ticket since 1957, as implied in respondents' brief. The passenger ticket approved by the Board in 1957, and which the majority of the Court below now find unsuitable to meet a judicially conceived requirement of notice in the treaty, is still in daily use by all members of the International Air Transport Association (IATA), whose members comprise 100 airlines from over 60 countries, and all members of the Air Transport Association of America (ATA), whose membership comprise 36 domestic airlines. See, Motions of IATA and ATA herein for leave to file briefs as *amici curiae*.

---

[2] *Pan American World Airways, Inc., et al., Conditions of Carriage and Related Traffic Regulations*, 24 C.A.B. 575, 577 (1957).

[3] *Id.* at 575-6.

[4] *Ibid.*

[5] Which states that for purposes of Article 1 of the Convention the "agreed stopping places" shall be those shown on the ticket or on the carrier's timetable. 24 C.A.B. 575 at 576-7.

In 1963 the Board took steps within its jurisdiction, entirely unrelated to the *requirements* of the treaty, to bring to the attention of American passengers the legal liability limitations, including dollar amounts, imposed by the treaty.[6] Specifically, the Board adopted an economic regulation which requires carriers, subject to the jurisdiction of the Board, to give notice to their passengers of the legal liability limitations of the Convention, the dollar amount thereof and the availability of accident insurance. This notice is given by means of signs posted at ticket counters, and at the carrier's option, in a separate printed statement, on the ticket envelope or on the ticket itself.[7]

In 1966 a substantial number of United States and foreign flag carriers (including petitioner), at the behest of the United States Government, entered into an agreement whereby each participating carrier agreed to a limit of liability of $75,000. The Board approved this agreement and, in doing so, required the carriers to furnish a separate piece of paper notifying their passengers of this agreement to a higher limit.[8] Since then the Board has taken steps to amend 14 C.F.R. § 221.175 to permit these carriers to use this new form of notice rather than the 1963 form of notice.[9]

In none of these proceedings has the Board ever recommended or adopted any amendment or modification in the form or content of the IATA passenger ticket and baggage check itself.

---

[6] CAB Economic Reg. No. ER-395 (Oct. 31, 1963). This Regulation amended 14 C.F.R. §221.175, effective March 1, 1964.

[7] *Id.* at 9-10.

[8] CAB Docket 17325, Order No. E-23680, May 13, 1966.

[9] CAB Docket 17725, EDR-105, September 19, 1966.

Regardless of which form the passenger ticket may take, now or in the future, and regardless of the steps the Board has taken, or may take in the future, to bring to the attention of American passengers the existence and amount of the treaty limitation, the questions which arise in this case will constantly recur.

III.

When respondents finally do touch upon the basic question in issue, they contend that it should be left to each country to decide for itself whether the sanction applies if any of the particulars listed in Article 3 (1)[10] are omitted from the ticket. This is an outright invitation to chaos in the interpretation and application of the treaty, and could lead to as many separate and diverse decisions as to the same ticket as there are parties to the treaty. Such a course would lead to the destruction of the basic purpose of the treaty, *i.e.*, uniformity. Respondents cite absolutely no authority in support of this position.

Even more than that, this theory suggested by respondents flies in the face of the express language of the treaty. Article 3 (2) provides:

> "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention." 49 *Stat.* 3015.

Respondents refer to this language in support of their theory that the treaty leaves to each country the decision of whether a particular ticket is adequate under Article

[10] 49 *Stat.* 3015.

3(1). To the contrary, this language of Article 3 (2), on its face, clearly evidences the intent of the parties that the irregularity of the ticket does not prevent the application of the rules of the Convention to the transportation. Thus, even in the absence, irregularity or loss of the ticket, the objective of uniformity is still achieved.

IV.

Respondents contend that three of the questions raised by petitioner are not issues in the case. With regard to Question 1., what has been stated *supra,* pages 1-2, clearly demonstrates the validity of this question.

Regarding Question 3., respondents expressly moved to dismiss petitioner's affirmative defenses seeking to limit liability for the alleged baggage losses (R. 10a, 5a-7a). Both the District Court and the majority of the Court below expressly held that the baggage checks delivered herein did not satisfy the requirements of Articles 4 (3) (h) and 4 (4). See, 253 F. Supp. 237 at 239 and 243; 370 F.2d 508 at 513-514; Appendix B, pp. 22-24, 47, 52. The holding of the majority of the Court below that the baggage check is inadequate under Articles 4 (3) (h) and 4 (4) has indeed placed the Second Circuit in direct conflict with the First Circuit regarding the legal sufficiency of the identical document under the treaty. See, *Seth* v. *British Overseas Airways Corporation,* 329 F.2d 302 (1st Cir. 1964), *cert. denied,* 379 U.S. 858 (1964). Contrary to the statement in respondents' brief, this conflict is direct and real, and not "transparent." See, Petition, pp. 16-17.

Finally, petitioner at no time has conceded that the question of print readability is one of law to be decided by a court. Petitioner did concede that the question of whether the statement in the standard airline passenger ticket and

baggage check—referring to the applicability of the liability rules of the treaty to the transportation—is adequate to meet the requirements of the treaty, is a question of law for the Court. But petitioner did not concede that the fact question of readability of the document should be decided by a court rather than a jury. Therefore, Question 4. is properly in the case. See Judge Moore's dissenting opinion, Appendix B, p. 25.

V.

Respondents comment in their brief that petitioner neglected to refer to discussions in the United States Senate concerning the merits of the Warsaw Convention. Petitioner did not make reference to these discussions because they were concerned with the question of whether the United States should remain a party to the treaty, and not with the meaning of the treaty. Throughout the history of this case, respondents have been unable, and have failed, to deal with the treaty as it stands. They have consistently been distracted in their approach to the questions in the case by the merits of the treaty itself, that is, whether the treaty is good or bad for the United States. For example see, R. 18a.

The majority of the Court below also has been distracted by the public clamor in recent years concerning the question of whether the United States should remain a party to the treaty. Appendix B, p. 19. Again, as stated by Judge Moore in his dissenting opinion:

> "The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts.

Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." Appendix B, p. 25.

CONCLUSION

This case does not involve a mere question of fact as to the readability of the ticket, as urged by respondents, but questions which go to the very meaning of the treaty itself. The consequences of the decision of these questions far transcend the interests of the immediate parties. The basic considerations underlying the questions in this case involve the good faith, honor and integrity of the United States in its relations with other nations. Therefore, these questions should be decided finally by this Court.

Respectfully submitted,

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

ROBERT P. GORMAN
JOHN H. MONTGOMERY, JR.
WILLIAM L. SCHIERBERL
of counsel

May 3, 1967

Certificate of Service

I hereby certify that I have, this ~~2nd~~ 3d day of May, 1967, served the foregoing reply brief upon respondents, and upon the International Air Transport Association and the Air Transport Association of America, amici curiae, by depositing same in a United States mail box at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid, addressed to the respective attorneys of record as follows:

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10004

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

May 3, 1967

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A., PETITIONER

v.

JOHN LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

THURGOOD MARSHALL,
Solicitor General,
CARL MARKEL,
Acting Assistant Attorney General,
J. NICHOLAS McGRATH, JR.,
Assistant to the Solicitor General,
MORTON HOLLANDER,
EDWARD R. KORMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A., PETITIONER

v.

JOHN LISI, ET AL.

ON PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of May 15, 1967, inviting the Solicitor General to express the views of the United States.

This case stems from suits instituted in the United States District Court for the Southern District of New York for wrongful death, personal injury, and property damage against petitioner, an Italian airline corporation (Alitalia). The injuries were suffered by American passengers aboard an Alitalia plane which crashed on February 26, 1960, at Shannon, Ireland, *en route* from Rome to New York. The parties agree that the flight in question constituted "international transportation" within the meaning of Article

1(1) and (2) of the Warsaw Convention[1] and was therefore subject to its terms. The issue is whether Alitalia is entitled to invoke that provision of the Convention (Article 22, *infra*, pp. 12–13) which permits an international air carrier to limit its liability for death or personal injury to $8,290.00 per passenger (the limit in effect at the time of the crash under that Article[2]), and to other stated sums for loss of personal property and baggage.

Alitalia supplied each passenger involved in this suit with tickets and baggage checks, the former at least one day prior to the flight. The following statement, both in English and in Italian, appears in small type on the cover of each ticket booklet:[3] "Each passenger should carefully examine this ticket, particularly the Conditions on page 4" (App. 47). On page four of the ticket, captioned "CONDITIONS OF CONTRACT," are set forth eleven separate con-

[1] Formally titled, "Convention for the Unification of Certain Rules Relating to International Transportation by Air," but commonly referred to by the name of the city in which it was concluded on October 12, 1929. It was adhered to by the United States in 1934, 49 Stat. 3000; T.S. No. 876. The relevant portions of the Convention are set forth in Appendix A to this memorandum, *infra*, pp. 11–13.

[2] On May 13, 1966, by Special Agreement between foreign and domestic air carriers, the limit of international air carrier liability for passenger death or injury was raised to $75,000 per person on transportation to, from, or with an agreed stopping place in the United States. C.A.B. Agreement No. 18,900 (Order Serial No. E.-23680), 31 F.R. 7302, 3 CCH Aviation Law Rep. ¶ 27,130.

[3] Relevant portions of a representative Alitalia passenger ticket are reproduced in approximately actual size at pages 45–57 of the separately bound appendix (hereinafter "App.") to the petition for certiorari, which petitioner has filed with the Clerk pursuant to Rule 23.

ditions in small type, number 2(a) of which recites (App. 49):

> Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 * * *.[4]

On respondents' motion for partial summary judgment, the district court struck petitioner's invocation of the limitation-of-liability provisions of the Convention as partial affirmative defenses to respondents' suits. *Lisi* v. *Alitalia-Linee Aeree Italiane,* 253 F. Supp. 237 (S.D. N.Y.) (App. 43). The court ruled that by printing the required warnings about limitation of liability on its passenger tickets and baggage checks in type so small as to be "virtually invisible," and by inserting those warnings in a context which

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[4] In none of the conditions is the limit on recovery in the event of death or personal injury specified in a monetary amount in any national currency, although number 4(d) of the Conditions specifies that recovery for damages to, or loss of baggage—

> * * * is limited to 250 French gold francs (consisting of 65½ milligrams of gold with fineness of nine hundred thousandths) or its equivalent per kilogram in the case of checked baggage, and 5000 such French gold francs or its equivalent per passenger in the case of unchecked baggage or other property * * *.

This unit of gold franc measure is the so-called "Poincare" franc, fifteen of which equals approximately one dollar in United States currency.

"artfully camouflaged" them,[5] Alitalia had, as a matter of law, failed to meet the requirements of Articles 3 and 4 of the Convention (see pp. 5–8, *infra*), and that it therefore was not entitled to invoke the liability limitation provisions of the Convention.[6]

On petitioner's appeal from that interlocutory decision (authorized under 28 U.S.C. 1292(b)), the Second Circuit affirmed by a divided vote. *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F. 2d 508. The majority stated that petitioner had not met the Warsaw Convention's prerequisites because "the required statement on the ticket [regarding limitations of liability under the Convention] 'was printed in such a manner as to virtually be unnoticeable and unreadable'" (App. 22). Petitioner's application for rehearing *en banc* was denied, three judges dissenting (App. 39), and Alitalia has petitioned for certiorari.

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[5] The district court characterized the ticket as follows (App. 52):

"The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed."

[6] The district court rejected respondents' additional contentions challenging the adequacy of the language in which the limitation warning had been expressed on the Alitalia tickets, ruling that (App. 52, n. 7): "If the statements were noticeable and readable, the passenger would have been sufficiently alerted * * *." See also note 9, *Infra.*

For the reasons outlined below, we do not urge further review.

1. Article 3(1) of the Warsaw Convention (49 Stat. 3015) provides:

> For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> * * * * *
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 3(2) further provides (*ibid.*):

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Similarly, Article 4[7] requires an international air carrier to issue a baggage check containing a statement that transportation is subject to the limitation provisions of the Convention; otherwise, the carrier is not entitled to limit its liability for the loss of personal property.

The circuits agree that the purpose of Articles 3 and 4 is to "afford [the passenger] a reasonable opportunity to take measures to protect himself against the limitation of liability." *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851, 856 (C.A. 2), certiorari

[7] Set out *infra*, pp. 11–12.

denied, 382 U.S. 816; *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494, 497 (C.A. 9); *Seth* v. *British Overseas Airways Corp.*, 329 F. 2d 302, 307 (C.A. 1), certiorari denied, 379 U.S. 858. Thus, it has been held that an airline which delivers to its passengers a ticket containing the required warning at a time too late for them to obtain other financial protection, *e.g.*, at the ramp immediately prior to embarkation (*Warren*), or after the plane is airborne (*Mertens*), has not complied with Article 3 and therefore may not avail itself of the Convention's provisions regarding limitation of liability.[8] The holding of the courts below—that in order to be able to invoke those provisions for limited liability an airline must not only make timely delivery of the ticket, but also provide on it the required warning in readable fashion—is consistent with these decisions and with domestic precedent on the necessity of adequate notice.[9] It also represents, in our-

[8] *Seth* v. *British Overseas Airways Corp.*, *supra*, involving a claim for loss of baggage, was decided favorably to the airline principally on the ground that the baggage ticket gave the passenger "clear notice" and "fair warning of the existence of limitations on the carrier's liability * * *." 329 F. 2d at 307. In any event, no question was there raised as to the readability of the notice, the litigated issue being whether the use of a conditional clause—unless carriage is not international—vitiated the required statement that the carriage was subject to the Convention. The court held it did not. *Seth*, therefore, is not in conflict with the decision below.

[9] See, *e.g.*, *Klar* v. *H. & M. Parcel Room, Inc.*, 270 App. Div. 538, 61 N.Y.S. 2d 285, affirmed, 296 N.Y. 1044, 73 N.E. 2d 912.

Petitioner's assertion to the contrary notwithstanding (*e.g.*, Pet. 6), the decision below is not properly characterized as holding that "actual notice" to the passenger must be shown before the Convention's limitations may be invoked. See App. 20–21, 46–47; Brief for the Respondents in Opposition, p. 6.

view, a proper performance of the judicial duty of the courts of contracting states to implement the broad provisions of the Convention.

Petitioner points out that Article 4, which relates to baggage, expressly provides that if a baggage check does not contain the required "particulars"—including a statement that liability under the Convention is limited—a carrier is not entitled to avail itself of the limitations provided for in the Convention. Relying upon the absence of such an express provision in Article 3, petitioner argues that a carrier is only estopped from raising the limitation defense in a suit for damages for personal injury or death of a passenger when it fails to deliver a ticket altogether, as provided in Article 3. *A fortiori,* petitioner says, it should have been allowed to assert the Convention limits of liability here since it supplied a ticket bearing a notice, albeit one in unreadable form.

To be sure, support for petitioner's position can be derived from a literal reading of the Convention. But, as the court below noted (App. 18), that literalism would deprive Article 3(1) of purpose and meaning; an inflexible literal approach—or reliance upon the maxim *expressio unius est exclusio alterius* (see App. 17)—is therefore inappropriate. In rejecting strict literalism and in interpreting Articles 3 and 4 to require notice in readable form, the courts below adhered to the approach consistently applied in interpreting the Convention. See *Mertens* v. *Flying Tiger Line, Inc., supra,* 341 F. 2d at 856–857, 858; *Warren* v. *Flying Tiger Line, Inc., supra,* 352 F. 2d

at 497–498; *Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804, 812 (C.A. 2); *Eck* v. *United Arab Airlines, Inc.*, 15 N.Y. 2d 53, 58–59, 255 N.Y.S. 2d 249, 251.[10]

Petitioner's contention that the Civil Aeronautics Board "expressly approved the form and content" (Pet. Reply Br., p. 3) of the airline passenger ticket which it used is misleading. The Board did not purport to pass on, much less decide, the size of type, type face, or other typographic details the airlines should employ in printing the required warning regarding limited liability. Rather, the Board merely approved an intercarrier agreement on the form of the ticket as not adverse to the public interest, since the agreed-upon form constituted a "substantial improvement"[11] over the one previously in use. Moreover, the Board has not merely criticized the inadequacy of the print size used by the airlines; it has taken affirmative steps and made mandatory that car-

[10] While language supporting petitioner's reading of the Convention may be found in *Grey* v. *American Airlines*, 95 F. Supp. 756, 758 (S.D. N.Y.) (see Pet. 9–10), we point out that the only issue as to the notice there in question was whether all the "agreed stopping places" were set forth on the ticket as Article 3(1)(c) of the Convention requires, not whether the required warning as to limitation of liability had been given. In affirming, the Second Circuit noted that the contention as to the omission of the stopping places was "technical and wholly unsubstantial" (227 F. 2d 282, 284, certiorari denied, 350 U.S. 989), which serves to distinguish this case. See App. 21, n. 8.

[11] *Pan American World Airways, Inc.*, 24 C.A.B. 575, 576. Indeed, the print on the airline ticket here (see App. 49–51) is far smaller than that used in the report of the Board upon which petitioner relies. See 24 C.A.B. 575, 579.

riers give international passengers additional notice—in larger type—regarding limits of liability under the Warsaw Convention. See the Board's ruling at 28 F.R. 11775–11777 (Nov. 5, 1963), and 14 C.F.R. 221.175.

2. In addition, the decision below is of little prospective importance. By Special Agreement approved on May 13, 1966 (see note 2, *supra*), the airlines (including Alitalia) raised the upper limits of liability to each passenger for death and personal injury to $75,000, and obligated themselves to provide additional "*notice in 10 point type*[12] advising international passengers of the limitations of liability" under the Warsaw Convention and that Special Agreement (emphasis added). 31 F.R. 7302 (May 19, 1966); 14 C.F.R. 221.175 (January 1, 1967 Rev.). The inclusion of that new notice (see Appendix B, *infra*, p. 14) would remedy the inadequacy in notice found by the courts below.[13]

---

[12] The footnotes in this brief are printed in 10 point type.

[13] Compare the notice at App. 48–49 (or in Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 513) with that at Appendix B, *infra*, p. 14 (also reproduced at 80 Harv. L. Rev. 598). See also Mendelsohn, *Another View on the Adequate Award in International Aviation Accidents*, Insurance Law Journal, April 1967, p. 197, at 203–207.

CONCLUSION

For the reasons stated, the United States does not urge further review.

THURGOOD MARSHALL,
Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

J. NICHOLAS MCGRATH, JR.,
Assistant to the Solicitor General.

MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys.

JUNE 1967.

APPENDIX A

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, the Warsaw Convention, 49 Stat. 3000, *et seq.*, provides in pertinent part:

Article 3:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Article 4:

(1) For the transportation of baggage, other than small personal objects of which the pas-

senger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

* * * * *

Article 22:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall

not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

APPENDIX B

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the convention and special contracts of carriage embodied in applicable tariffs provide that the liability of British Overseas Airways Corporation and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US Dollars 75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US Dollars 8,290 or US Dollars 16,580.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

NOTE

The limit of liability of Seventy Five Thousand United States Dollars above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of Fifty Eight Thousand United States Dollars exclusive of Legal Fees and Costs.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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ADVICE TO INTERNATIONAL PASSENGERS ON L

Passengers on a journey involving an ultimate destinati
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The limit of liability of Seventy-five Thousand
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JUL 18 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

The Solicitor General's Memorandum[1] has failed to inform the Court of the severe impact which the majority decision of the Court below has had upon the international aviation relations of the United States, and of the doubt which this decision has cast upon the reliability of the United States in abiding by the rules established by the Treaty.

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[1] Filed pursuant to the Court's Order of May 15, 1967, which reads:

"The Solicitor General is invited to file a brief expressing the views of the United States."

I.

To date, AUSTRALIA, BRAZIL, CANADA, ITALY, THE FEDERAL REPUBLIC OF GERMANY, THE NETHERLANDS and THE UNITED KINGDOM, have each officially protested to the Government of the United States that the majority decision of the Court below is contrary to their agreement with the United States as expressed in the Treaty.

All of these nations participated in the drafting of the original Treaty. They know that the imposition of the sanction in Article 3 (2) was intended to be limited to cases of non-delivery of the passenger ticket. They know that this intent is clearly expressed in the Treaty. The Government of the United States also knows it. Otherwise, why did the United States urge, in 1955, that the Treaty be amended so as to extend the scope of the sanction to cases of failure to give notice?

II.

The Solicitor General's Memorandum overlooks the views of the United States as expressed by its official representatives at the Hague Conference in 1955 where several amendments to the Warsaw Convention were then being considered. At that time, the United States sought and achieved an amendment to the Treaty to extend the sanction in Article 3 (2) to cases where the passenger ticket fails to include notice that the limits of liability may be applicable.[2]

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[2] I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 134 (1955). The Hague Protocol amending the Warsaw Convention in this and other respects has never been ratified by the United States, nor does it appear probable that it ever will be ratified. See, S. EXEC. DOC. H, 86th Cong. 1st Sess. (1959); S. EXEC. REPT. No. 3, 89th Cong. 1st Sess. (1965); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 504-516, 532-546 (1967).

If the majority decision of the Court below is correct, as urged by the Solicitor General, then the United States is made to appear to have sought and obtained a wholly unnecessary amendment to Article 3 (2) in 1955.

When the Solicitor General was a member of the Court of Appeals for the Second Circuit, he placed conclusive reliance on the official position of the Government of the United States at the Hague Conference in 1955 in deciding a question involving the proper interpretation of Article 2 of the Warsaw Convention. In *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), the argument was advanced by the plaintiff that transportation performed under contract for the Military Air Transport Service of the United States Government fell within the scope of the reservation of the United States under the Additional Protocol with respect to Article 2, and, therefore, was not subject to the Warsaw Convention. In affirming the District Court's rejection of this argument, then Judge Marshall reasoned as follows:

> "The regularity of the chartering relationship between the United States and defendant gives us some cause to look upon this analytic distinction with some circumspection. *But these doubts are dispelled by the negotiations surrounding the adoption of the Hague Protocol of 1955.* See generally, International Conference of Private Air Law, The Hague, September 1955, International Civil Aviation Organization, Doc. 7686-LC/140
>
> "A draft protocol was prepared by the Legal Committee of the International Civil Aviation Organization at Rio de Janeiro in September 1953 and was submitted to the Hague Conference in September 1955. It sought to amend Article 2 of the Convention to

read: 'The Convention shall not apply to * * * [c]arriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reserved by such authorities.' *The natural inference from this effort to amend the Convention is that without such an amendment the Convention would be applicable to such flights, or at least those proposing the amendment thought so. . . . The unavoidable conclusion* is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit." 341 F. 2d 851 at 853-4. (Emphasis added.)

Now, however, the Solicitor General would ignore these negotiations in a virtually identical situation, and thereby avoid an equally "unavoidable conclusion," involving the proper interpretation of Article 3 (2) of the Convention.

III.

The Solicitor General's Memorandum contends that this case is of "little prospective importance" in view of the 1966 agreement among a number of airlines (including Petitioner) to a new limit of liability of $75,000, and the form of notice of the applicability of this new limit now required by the Civil Aeronautics Board. This same argument was advanced by Respondents in their brief, and was dealt with in detail in Petitioner's reply brief at pages 3-5.

This contention is lacking in merit in view of the following factors:

1. The United States is still a party to the Warsaw Convention.

2. The basic question involved is whether the sanction in Article 3 (2) applies in the event of failure to give notice of the applicability of the limit of liability established by the Treaty.

3. This question will repeatedly arise in the future, regardless of the amount of the limitation which may be in force, and regardless of the form of notice which may be required by the Civil Aeronautics Board.

4. The question of whether the sanction of absolute unlimited liability in Article 3 (2) is to be applied for failure to give notice will recur constantly in subsequent cases where no notice has in fact been given, or where some Court concludes, as did a majority of the Court below, that the CAB approved form of notice is inadequate for one reason or another. Significantly, the CAB approved form of notice now in use is not required to be printed on the ticket, but may be set forth on a separate paper. 14 C.F.R. §221.175. A fact question as to whether a passenger actually received this slip of paper is bound to arise in many, if not most, future cases because of the holding of the majority decision of the Court below. A carrier, confronted with the contention by a passenger that he did not receive the slip of paper, will certainly include in its defense a contention that the Treaty does not require notice in any event, and that no sanction applies under the Treaty for the failure to give notice of the limitation of liability. Thus, the identical questions presented by the Petition herein are certain to arise again and again in aviation accident litigation in this country.

5. There are more than 100 cases pending today in the courts of the United States involving the Warsaw Conven-

tion and passenger tickets and baggage checks identical in form to those involved herein. Final resolution of these cases will be directly affected by the ultimate decision in this case.

6. The same form of passenger ticket and baggage check as involved herein is still in daily use throughout the world by all members of IATA and ATA.

IV.

This is not a "small print" case, as the Solicitor General's Memorandum assumes. The Petition presents basic questions involving proper interpretation of the Treaty, and as such they are important questions of federal law which have not been, but should be settled by this Court.

The Solicitor General's Memorandum ignores the legislative history of the drafting of Article 3 (2). This history demonstrates unequivocally the intent of the drafters to limit the imposition of the sanction in Article 3 (2) to cases of non-delivery of the passenger ticket. An early draft of Article 3 (2), which would have extended the imposition of the sanction to cases of failure to include the notice in the passenger ticket, was expressly considered, and after debate, rejected by the parties. See, IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, pp. 100-101, 129, 168 (1930); Petition, pp. 10-12.

This clear intent of the parties to the Treaty is evident from a comparison of Article 3 (2) with Articles 4 (4) and 9. The Solicitor General's Memorandum treats lightly of the significant distinction between these related articles, and purports to distinguish *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) on this

point. In a "carefully prepared opinion" adopted by the Court of Appeals, District Judge Noonan analyzed the distinction between Articles 3 (2) and 4 (4) and 9, and concluded that the parties clearly intended that the imposition of the sanction in Article 3 (2) be limited solely to cases of non-delivery of the passenger ticket. Judge Noonan stated:

> "Article 3 (2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4 (4) and 9. *I must conclude that this omission or difference is most significant.* For I cannot agree with plaintiffs' argument that Article 3 (2) intends that the ticket delivered contain the items set forth in Article 3 (1), when those who drafted the treaty were so explicit in this regard in Articles 4 (4) and 9." 95 F. Supp. 756 at 758. (Emphasis added.)

CONCLUSION

The substantial error of the majority decision of the Court below, and the necessity for review by this Court, are best expressed in the words of Judge Moore:

> "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability.
>
> * * * * *
>
> Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Gov-

ernment even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." (R. 74a-75a; Appendix B, pp. 24-25).

Notwithstanding the view advanced by the Solicitor General's Memorandum, the questions presented herein should be decided finally by this Court.

Respectfully submitted,

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

ROBERT P. GORMAN
JOHN H. MONTGOMERY, JR.
WILLIAM L. SCHIERBERL
of counsel

July 18, 1967

Certificate of Service

I hereby certify that I have, this 18th day of July, 1967, served the foregoing reply brief upon respondents, and upon the International Air Transport Association, the Air Transport Association of America, and the United States, *amici curiae,* by depositing same in a United States mail box at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid, addressed to the respective attorneys of record as follows:

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THURGOOD MARSHALL
Solicitor General
Department of Justice
Washington, D.C. 20530

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10005

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

July 18, 1967

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE REPUBLIC OF ITALY FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ALFRED C. CLAPP
Counsel for the Republic of Italy
744 Broad Street
Newark, New Jersey

CLAPP & EISENBERG
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE REPUBLIC OF ITALY FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Republic of Italy moves this Honorable Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.

Counsel for the petitioner have consented to the filing of this brief, but counsel for respondents has refused consent. Accordingly, this motion is brought pursuant to Rule 42.

The Republic of Italy is a High Contracting Party to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929 (commonly referred to as the Warsaw Convention).[1] Representatives of the Government

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[1] 49 Stat. 3000, *et seq.*; T.S. 876.

of Italy participated in the drafting of this Treaty, and Italy was one of the original signatories to the Treaty. The Republic of Italy has been a party to this Treaty together with the United States continually since the Treaty came into force as to the United States on October 29, 1934.

The decision of the United States Court of Appeals for the Second Circuit, review of which is sought in this Court by petitioner, is inconsistent with the mutual commitments assumed by the Governments of Italy and the United States as expressed in the Treaty. If the said decision remains unreversed by the Supreme Court, it is the conviction of the Republic of Italy that the scheme of the Warsaw Convention will be effectively defeated.

These views of the Republic of Italy were officially made known to the Secretary of State of the United States by a Note from the Ambassador for the Republic of Italy dated April 1, 1967, ref. 02772.

Having been advised that these views have not been brought to the attention of this Court by the United States, the Republic of Italy feels constrained to petition this Court for leave to intervene as *amicus curiae* herein.

Respectfully submitted,

ALFRED C. CLAPP
Counsel for the Republic of Italy

CLAPP & EISENBERG
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE REPUBLIC OF ITALY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Republic of Italy respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari herein, to review the decision and judgments of the United States Court of Appeals for the Second Circuit entered December 16, 1966, 370 F.2d 508.

I

The Court of Appeals has achieved a result in direct conflict with the intent of the High Contracting Parties to the Warsaw Convention, as clearly expressed therein. The parties to the Treaty expressly limited the imposition of the sanction of unlimited liability to cases where no passenger ticket was delivered.[1] The extension of this

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[1] 49 Stat. 3015.

sanction to cases where the passenger ticket delivered fails to contain a statement that the transportation is subject to the liability rules of the Convention, was expressly considered and rejected by the drafters of the Convention, which included the Republic of Italy.[2]

II

The decision of the Court of Appeals is completely at variance with the understanding of the Republic of Italy as to its commitment to the United States as expressed in the Treaty. The decision is also at variance with the apparent understanding of the United States as to its commitments as expressed in the Treaty. In 1955 the Government of the United States took the position that an amendment of the treaty would be required if the sanction of unlimited liability were to be extended to cases where the passenger ticket fails to notify the passenger of the applicability of the liability rules of the Convention.[3] The Court of Appeals, however, has now unilaterally declared the existence of such sanction in the unamended Treaty.

CONCLUSION

The Republic of Italy respectfully submits that this decision presents issues of international importance, including the question of the extent to which the Courts of the United States can render judgments in direct conflict with the clearly expressed intent of the parties to a Treaty.

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[2] IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, pp. 100-101, 129, 168 (1930).

[3] I International Conference on Private Air Law, ICAO Doc. 7686-LC/140 p. 134 (1955).

These issues, therefore, should be decided finally by the Supreme Court of the United States.

Respectfully submitted,

ALFRED C. CLAPP
Counsel for the Republic of Italy

CLAPP & EISENBERG
Of Counsel

Certificate of Service

I hereby certify that I have, this 28th day of September, 1967, served the foregoing motion and brief upon petitioner and respondents, and upon the International Air Transport Association, the Air Transport Association of America, and the United States, *amici curiae*, by depositing same in a United States mail box at 744 Broad Street, Newark, New Jersey, with first class postage prepaid, addressed to the respective attorneys of record as follows:

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10005

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

September 28, 1967

ALFRED C. CLAPP
Counsel for the Republic of Italy

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, ETC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
and
BRIEF FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

EDWIN LONGCOPE
26 Broadway
New York, N. Y. 10004
Attorney for the UNITED KINGDOM OF GREAT BRITAIN and NORTHERN IRELAND.

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IN THE

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OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, ETC., *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The United Kingdom of Great Britain and Northern Ireland moves this honorable Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari in the above entitled cases.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondent has refused consent. Accordingly, leave of this Court is sought under the terms of Rule 42 of the Court's Revised Rules.

The nature of the movants' interest, and its reasons for believing that these cases present an issue of grave international concern, are set forth in the attached brief.

Respectfully submitted,

For the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,
by its attorney

EDWIN LONGCOPE
26 Broadway
New York, N. Y. 10004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, ETC., *et al.*,
Respondents.

BRIEF FOR THE UNITED KINGDOM AS AMICUS CURIAE

Introduction

The United Kingdom of Great Britain and Northern Ireland respectfully submits this brief as *amicus curiae* in support of the petition of Alitalia-Linee Aeree Italiane, S.p.A. ("Alitalia") that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above entitled cases on December 16, 1966, 370 F. 2d 508.

I. The Nature of the Interest of The United Kingdom

The United Kingdom is one of some ninety contracting countries party to the Warsaw Convention of 1929[1], to which the United States of America is also a party. It is

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000. T. S. 876.

the interest of the United Kingdom that the United States of America, and all other contracting parties, should give effect to the Convention in accordance with its express terms, and that the uniformity of law which the Convention establishes should not be destroyed by the construction placed upon the terms of this treaty by the courts of a contracting party.

It has been noted by one authority[2] that the decision herein by the District Court, affirmed by a majority of the Court of Appeals, is "breaking a chain of hundreds of precedents". It is also noted that the judgments of the Courts below on the point at issue are in conflict with the official position of the United States Government, taken at the Hague Conference in 1955[3], that Article 3(2) of the Warsaw Convention does not require that "notice" be given in the passenger ticket as to the applicability of the Convention limits of liability.

The government of the United Kingdom therefore considers that the resolution of the issue presented by the judgments below is of deep concern to the United Kingdom, as one of the contracting parties to the Convention, that these judgments should not be permitted to stand without review by this honorable Court.

II. The Proceedings Below

These cases involve claims on behalf of passengers on an Alitalia aircraft which crashed on February 26, 1960,

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[2] Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).

[3] The Hague Protocol extended the scope of sanctions under the Warsaw Convention to failure to give notice on the passenger ticket of Convention limits of liability. However, the United States has not ratified the Hague Protocol and hence there was no requirement here that the passenger ticket contain such notice, though in fact it did.

while en route from Rome to New York. The passenger tickets were the IATA uniform passenger ticket, heretofore approved by the Civil Aeronautics Board,[4] and which is the standard ticket for virtually all international air traffic. The ticket contained notice thereon that it was subject to the provisions of the Warsaw Convention.

The District Court held that the size of type used in the "notice" provision was so small as to be "virtually invisible", that it did not therefore give adequate notice of the applicability of Convention limitations on liability, was not in compliance with the provisions of Article 3(1)(e) of the Convention, and that the defendant carrier was therefore denied the limitations on liability granted by Article 22 of the Convention.[5]

The majority of the Court of Appeals, in affirming the judgment of the District Court, observed that the terms of the Convention were "arbitrary limitations on liability—which have been severely and repeatedly criticized . . ."[6] They further noted that "a judge could not reasonably have found that the tickets and baggage checks gave the passengers the required notice."[7] Judge Moore, dissenting in the Court of Appeals, stated that "the majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it."[8]

The judgment below therefore seeks to import into Article 3(1)(e) of the Convention a provision not to be

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[4] See *Pan American World Airways, et al.* v. *Conditions of Carriage,* 24 C. A. B. 575 (1957).

[5] *Lisi* v. *Alitalia-Linee Italiane,* 253 F. Supp. 237, 243 (SDNY, 1966).

[6] *Lisi* v. *Alitalia-Linee Aeree Italiane,* 370 F. 2d 508, 512 (CCA 2d, 1966).

[7] *Id.* at 514.

[8] *Id.* at 515.

found therein, i.e., a provision as to the size of type which must be employed to give "notice", and a second provision not to be found in the wording of the said Article, i.e. that the failure to give such "notice" by a larger, and what the Court considers to be a more readable size of type, the carrier is thereby deprived of the limitations on liability provided in Article 22 of the Convention.

The provision which the Courts below would seek to write into the Convention is one which was considered and rejected by the original drafters of the Convention, who declined to extend the imposition of sanction to failure to include a notice provision in the passenger ticket.[9]

This provision which the Courts below would insert is also contrary to the position taken by the United States Government at the Hague Conference of 1955 in proposing to amend Article 3(2) of the Convention to impose sanction . . . *"if the ticket does not include the notice required by paragraph 1(c) of this Article, . . ."* (Emphasis added).[10] This proposed amendment, which was adopted as the Hague Protocol, has not been ratified by the United States and is therefore not applicable here.

The decision below also ignores the fact that the Hague Conference of 1955 considered and rejected a proposal by the United States to fix the size of letters in the notice provision.[11]

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[9] See, Heme Conference Internationale de Droit Prive Aerien, ICAO Doc. 7838, pp. 100-101, 129, 168 (1930).

[10] Volume I, International Conference on Private Air Law, ICAO Doc. 7686 LC/140, p. 134 (1955).

[11] At the Hague Conference of 1955 the United States proposed that the Protocol specify that the notice provision therein "be set out in letters of not less than five millimeters high." The Conference rejected this proposal. Volume 1, Minutes, International Conference on Private Air Law, The Hague, September, 1955, ICAO Doc. 7686—LC/140, page 124.

III. Reasons For Granting the Writ

The fundamental purpose of the Warsaw Convention, as the preamble indicates, was to establish uniform documentation and provisions as to liability in international air transport.[12] This purpose would be defeated by the unilateral interpretation placed upon the provisions of Article 3(1)(e) by the courts of one of the contracting parties. The way would be opened to varying or differing interpretations by the courts of other contracting countries, which would reduce the Convention to a meaningless shambles. The end result could only be to impugn the integrity and good faith of countries signatory to such treaties and defeat the essential need for a uniform scheme of applicable law in the field of international air transportation.

The comments of the majority of the Court of Appeals, in criticizing the Convention as "arbitrary" and giving a "one-sided advantage" to the carrier[13] manifest the majority's dislike for the Convention's limitations on liability and supply the motivation for their decision upholding the judgment of the District Court. This action by the majority is aptly characterized by Judge Moore in his dissenting opinion, wherein he stated:

> "The majority in their opinion indulge in judicial treaty making.
>
> * * *
>
> The majority do not approve of the terms of the treaty and, therefore, by judicial fiat, they rewrite it. They think a 'one-sided advantage' is being taken of

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[12] "[The High Contracting Parties]: Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier . . . have concluded and signed the following convention:" 49 Stat. 3014 (1934).

[13] 370 F. 2d 508, 512-513.

> the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability."[14]

It is considered by the Government of the United Kingdom that the decision of the majority of the Court of Appeals, based as it was upon their manifest dislike for the limited liability provisions of the Convention, exceeds the proper bounds of judicial interpretation of treaties. Reference is made on this point to the cases cited in the brief filed herein on behalf of the International Air Transport Association, as *amicus curiae,* and particularly to the quotation, on page 11 of its brief, from the decision of this Court in *Maximov* v. *United States,* 373 U. S. 49, (1962), wherein this Court stated, at page 54:

> ". . . it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."

The government of the United Kingdom joins in the statement of Judge Moore in his dissent below that

> "The language of the treaty is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem."[15]

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[14] Id. at 514.

[15] Id. at 515.

CONCLUSION

The issue presented in the instant cases far transcends the mere question whether the type used on the "notice" provision of the standard passenger ticket is of sufficient size to be readable and hence to give adequate notice thereof. The real issue is whether the decision of the majority of the Court of Appeals is in direct conflict with the express provisions of the Warsaw Convention and whether the courts of a contracting nation may, because of their disapproval of the Convention, rewrite it by judicial fiat. Such unilateral action by the courts of the United States of America is in direct conflict with the position taken by the Government of the United States at the Hague Conference of 1955 that the sanction of unlimited liability does not apply where the passenger ticket does not make reference to the applicability of the Warsaw Convention. It is in conflict with the refusal of the United States to ratify the Hague Protocol, proposed by the United States and adopted by the Hague Conference of 1955, which provides that the sanction of unlimited liability shall apply if the passenger ticket does not give notice of the applicability of convention limits of liability.

If the decision of the majority of the Court of Appeals is to be confirmed the Government of the United Kingdom is concerned that it shall have to take appropriate action to protect its carriers from the unlimited liability ensuing therefrom.

It is therefore respectfully urged that the petition of Alitalia for a writ of certiorari be granted.

Respectfully submitted,

EDWIN LONGCOPE
26 Broadway
New York, N. Y. 10004

Attorney for the
UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

CERTIFICATE OF SERVICE

I hereby certify that copies of this motion and the attached brief have been served upon

AUSTIN P. MAGNER, Esquire
GEORGE N. TOMPKINS, JR., Esquire
Counsel for Petitioner
One Rockefeller Plaza
New York, N. Y. 10020

THEODORE E. WOLCOTT, Esquire
Attorney for Respondents
36 West 44th Street
New York, N. Y. 10036

HAROLD L. WARNER, JR., Esquire
Attorney for International Transport Association
25 Broadway
New York, N. Y. 10004

JOHN E. STEPHEN, Esquire
JOSEPH F. HEALY, JR., Esquire
Attorneys for Air Transport Association of America
1000 Connecticut Ave., N. W.
Washington, D. C. 20036

Such service was made by posting the foregoing documents by first class mail.

EDWIN LONGCOPE

Office-Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

RESPONSE IN OPPOSITION TO MOTIONS OF ITALY AND THE UNITED KINGDOM FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, N. Y. 10036

IN THE

Supreme Court of the United States

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RESPONSE IN OPPOSITION TO MOTIONS OF ITALY AND THE UNITED KINGDOM FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

Preliminary Note

The Republic of Italy and the United Kingdom have each made extremely belated motions for leave to file a brief *Amicus Curiae.* In the interest of brevity the respondents are presenting this single opposing Response to both motions.

It is well known that the Republic of Italy owns and controls Alitalia Airlines, the defendant—petitioner in this case. It is also well known that the United Kingdom owns and controls British Overseas Airways Corporation (BOAC) and British European Airways (BEA) which are engaged in commercial international air transportation. It is clear that these motions in reality are being made by national commercial air carriers cloaked in gov-

ernmental aura and that these applications are not necessarily in the public interest.

The Petition for a Writ of Certiorari was filed herein on or about March 21, 1967. Since that time a seemingly endless series of applications to file *Amicus* briefs favoring Alitalia Airlines (accompanied by briefs nevertheless) have been filed by various commercial airline interests. These are the latest applications, and it is respectfully submitted they are too late. Unfortunately, the respondent—passenger survivors do not have the resources to continually prepare and print opposing briefs. It is respectfully requested that the court treat any future applications of this nature as opposed by the respondents on the basis of their briefs previously filed herein. It is respectfully submitted that the briefs attached to the applications should be stricken. The Response herein has not attempted to answer the briefs in detail for the above reasons.

The Motions Should Be Denied

It is respectfully submitted that the motion should be denied forthwith for the following additional reasons:

1. The motions do not set forth facts or questions of law that have not been presented by the Petition for a Writ of Certiorari. The decision herein of the Court of Appeals determined a simple issue and merely held that the exculpatory provisions in a ticket delivered to a passenger must be in readable form within the purposes of the convention. The exaggerated postures assumed by movants is unwarranted. As was said by the Solicitor General at page 9 of the *Amicus* brief submitted herein by the United States at the request of this court: "the decision below is of little prospective importance."

2. The movants (or their *alter egos*) appear to be somewhat critical of our judicial system and its operation here in the broad public interest. But the United States at page 6 of its brief has specifically stated:

> "The holdings of the courts below . . . represents, in our view a proper performance of the judicial duty of the courts of contracting states to implement the broad provisions of the Convention."

CONCLUSION

WHEREFORE it is respectfully submitted that the motions be denied.

Respectfully submitted,

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, N. Y. 10036

FILE COPY

NOV 18 1967

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DEC 11 1967

JOHN F. DAVIS, CLERK

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF ARNOLD HOLTZMAN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

STUART M. SPEISER
Counsel for Applicant
Arnold Holtzman
Office and P. O. Address
200 Park Avenue
New York, New York 10017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF ARNOLD HOLTZMAN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

ARNOLD HOLTZMAN respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The attorney for petitioner herein, George N. Tompkins, Jr., Esquire, of the firm of Condon & Forsyth, One Rockefeller Plaza, New York, New York 10020, has refused to consent to applicant's filing of such brief as *amicus curiae*. The attorney for respondents, Theodore E. Wolcott, Esquire, 36 West 44th Street, New York, New York 10036, has also refused to consent to the filing of such brief as *amicus curiae*. Accordingly, leave of this Court is sought under the terms of Rule 42 of this Court's Revised Rules.

The applicant, Arnold Holtzman, has an interest in this case in that he now has pending an action for damages in the Supreme Court of New York, County of Kings, entitled "ARNOLD HOLTZMAN, Plaintiff —v— BRITISH EUROPEAN AIRWAYS and DE HAVILLAND, Defendants," being Index No. 7840/1963 on the Docket of said Court, in which the question involved is the same as that presented for decision in the instant case, namely—are the limitation of liability provisions contained in Article 22(1) of the Warsaw Convention (49 Stat. 3000-3026), available to an air carrier of a passenger receiving bodily injuries on a flight in international transportation in light of the provisions of Article 3(2) of the Convention (49 Stat. 3015) precluding availability of various provisions of the Convention limiting liability where the carrier accepts a passenger without a passenger ticket having been delivered, where the purported ticket contains, on the front thereof in exceedingly small print, the message, "Each passenger should carefully examine this ticket, particularly the Conditions on page 4," and the "notice" to the passengers is located on page 4 of a ticket and baggage checks combined in the form of a small booklet and (to quote the two courts below), is contained in footnotes printed "in microscopic type" and "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'", and the "exculpatory statements . . . are virtually invisible . . . are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else," and "'are so artfully camouflaged that their presence is concealed'"? Applicant Holtzman states that the ticket "delivered" to him by British European Airways, on the international flight on which he sustained severe and permanent bodily injuries, is identical, as to its pertinent parts, printing, typography

and legibility, to the ticket delivered to the respondents in the instant case. In addition, there are many other cases, now pending in various state and federal courts, involving identical tickets "delivered" to passengers who were killed or suffered severe bodily injury in international flight air crashes or accidents, in which the Warsaw Convention is being attempted to be used as a defense, among them being the following captioned cases in which the plaintiffs are represented by applicant's counsel, Stuart M. Speiser: *Volney Righter, etc.* v. *American Air Lines, et al.*, Supreme Court, County of New York, Index No. 11487/64; *Reiger* v. *Pan American, et al.*, Supreme Court, County of New York, Index No. 13252/66; *Byzinski* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 6747/65; *Rygaard* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9722/65; *Harrison* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9723/65; *Graham* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9718/65; *Zuckerman* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9721/65; *Sommers* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9720/65; *Boryk* v. *Aerolineas Argentina, et al.*, U. S. D. C., Southern District, New York, 62 Civil 3855; *Eck* v. *United Arab Airlines*, Supreme Court, County of New York, Index No. 7778/63; *Eck* v. *United Arab Airlines*, U. S. D. C., Southern District, New York, 64 Civil 3855; *Love* v. *Pakistan Air Lines*, U. S. D. C., Southern District, New York, 65 Civil 2369; *Massenburg* v. *Eastern Air Lines, et al.*, U. S. D. C., Eastern District, New York, 65 A. 640 and *Powell* v. *Eastern Air Lines, et al.*, U. S. D. C., Eastern District, New York, 66 A. 101.

Applicant Holtzman says that the international air carrier which he is suing, namely, British European Airways, is owned by the Government of the United Kingdom of Great Britain and Northern Ireland, which Government has already been granted leave by this Court, in its order of November 6, 1967, to file a brief herein as *amicus curiae*. Applicant Holtzman further states that he has attempted to present his views to this Court, by and through his present counsel, as to the invalidity of the purported "withdrawal" of the Government of the United States of its earlier denunciation of the Warsaw Convention, in the case of Arnold Holtzman, Petitioner, v. Dean Rusk, Secretary of State, Respondent, Case No. 1294 on the Docket of this Court for the October, 1965, Term; petition for writ of certiorari was denied May 16, 1966, reported in 384 U. S. 943, 16 L. ed. 2d 541, 86 Sup. Ct. 1466. Moreover, leave to file briefs as *amici curiae*, in support of the position of the Petitioner herein, has also been granted by this Court, in its order of November 6, 1967, to: the International Air Transport Association; Air Transport Association of America; and the Republic of Italy. Thus, the same insurance and economic interests already participating in the *Lisi* matter are militating against the applicant in his own litigation; and the defendant in applicant Holtzman's case will be heard by this Court, but not Holtzman, the plaintiff, unless this motion is granted by this Court. By way of contrast, within the knowledge of applicant and his attorneys, no one, other than the named respondents, is thus far supporting the position of respondents in this Court.

The brief of respondents herein in the United States Court of Appeals for the Second Circuit argues that because of the form, typography and illegibility of the purported "notice" in the tickets received by respondents, the

petitioner carrier did accept respondents without tickets having been delivered within the meaning of Article 3(2) of the Warsaw Convention. There are salient points, however, not only as to the original history, purpose and intent of the Warsaw Convention with respect particularly to the scope and intended purpose of Articles 3(2), 22(1), and related provisions of the Convention, but also as to the manner in which this purported Treaty should be construed and applied, that have not been covered therein; and applicant, desiring to present these points, has no reason to believe that presentation of and argument upon them will be expanded and be made complete for consideration by this Court—particularly in light of the fact that respondents' position in this Court will be opposed not only by the brief and argument of petitioner, but also by the briefs of the four *amici curiae* who were granted leave to file briefs, as aforesaid, by this Court.

The interests of the individual parties litigant in this case are not co-extensive in scope with the far-reaching implications of the questions and points at issue. If the points intended to be presented by applicant are approved by this Court, the decisions of the Courts below will be affirmed.

Respectfully submitted,

STUART M. SPEISER
Counsel for Applicant
Arnold Holtzman
Office and P. O. Address
200 Park Avenue
New York, New York 10017

FILED
NOV 29 1967
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

MEMORANDUM OF PETITIONER IN OPPOSITION TO MOTION OF ARNOLD HOLTZMAN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

MEMORANDUM OF PETITIONER IN OPPOSITION TO MOTION OF ARNOLD HOLTZMAN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Consent to the filing of a brief as *amicus curiae* by ARNOLD HOLTZMAN was refused by petitioner because applicant, in his request, failed to specify any facts or questions of law, relevant to the disposition of this case, that will not adequately be presented by the existing parties.

Applicant is a plaintiff in a suit pending in the Supreme Court of the State of New York wherein he seeks to recover damages for alleged personal injuries sustained in an aircraft accident. Applicant's rights in that case are subject to the provisions of the same Treaty[1] as involved herein, but no issue has been raised by him in that case concerning the conformity of his passenger ticket to Treaty

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw October 12, 1929, 49 Stat. 3000; T.S. 876 (commonly referred to as the Warsaw Convention.)

requirements. Nevertheless, any interest of applicant in the outcome of this case is precisely co-extensive with the interests of respondents herein, and will adequately be presented by counsel for respondents. These issues are sharply drawn and do not admit of any third perspective, such as that attempted to be interjected by applicant and his counsel. See Motion of Arnold Holtzman, Page 5. Counsel for applicant concededly intends to add cumulative argument and materials with regard to these issues.

Counsel for applicant manifests concern over whether counsel for respondents will adequately present the position of respondents to this Court. He need have none, for counsel for respondents is able and zealous, and far more experienced in the field of aviation law than counsel for applicant.[2]

There are more than one hundred cases pending in the Courts of the United States today, both State and Federal, in which damages are being sought for personal injury and death of passengers whose rights are subject to the provisions of the Warsaw Convention. The interests of the parties to those cases in the issues before the Court in this case, are identical to the interests of the existing parties herein. To permit one of the parties in those cases to file a brief as *amicus curiae* in this case would create a precedent for the filing of briefs by all such parties, even though in virtually all cases the motivation would not be concern with the adequacy of presentation of the position of respondents herein, but rather the desire of counsel to have their name associated with a case being reviewed by this Court.

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[2] The firm of which counsel for applicant is a member sought leave to intervene in their own right in this case before the Court of Appeals. This application was summarily denied by the Court of Appeals.

For the foregoing reasons, petitioner respectfully requests that the motion of ARNOLD HOLTZMAN, for leave to file a brief as *amicus curiae*, be denied in all respects.

Respectfully submitted,

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

November 28, 1967

Certificate of Service

I hereby certify that I have this 28th day of November, 1967, served the foregoing memorandum upon respondents, the International Air Transport Association, the Air Transport Association of America, the United States, the United Kingdom of Great Britain and Northern Ireland, the Republic of Italy, and Arnold Holtzman, by depositing same in the United States mailbox at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid addressed to the respective attorneys of record as follows:

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10015

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

EDWIN LONGCOPE
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

ALFRED C. CLAPP
Counsel for the Republic of Italy
744 Broad Street
Newark, New Jersey

STUART M. SPEISER
Counsel for applicant Arnold Holtzman
200 Park Avenue
New York, New York 10017

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

MOTION FILED
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE REPUBLIC OF ITALY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND ACCOMPANYING BRIEF

ALFRED C. CLAPP
Counsel for the Republic of Italy
744 Broad Street
Newark, New Jersey

CLAPP & EISENBERG
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE REPUBLIC OF ITALY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Republic of Italy moves this Honorable Court for leave to file the attached brief as *amicus curiae* in support of the Petitioner Alitalia-Linee Aeree Italiane, S.p.A.

Counsel for the petitioner have consented to the filing of this brief, but counsel for respondent has refused consent. Accordingly, this motion is brought pursuant to Rule 42.

The Republic of Italy is a High Contracting Party to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929 (commonly referred to as the Warsaw Convention).[1] Representatives of the Government

---

[1] 49 Stat. 3000, *et seq.*; T.S. 876.

of Italy participated in the drafting of this Treaty, and Italy was one of the original signatories to the Treaty. The Republic of Italy has been a party to this Treaty together with the United States continually since the Treaty came into force as to the United States on October 29, 1934.

The decision of the United States Court of Appeals for the Second Circuit is inconsistent with the mutual commitments assumed by the Governments of Italy and the United States as expressed in the Treaty. This case presents questions regarding the meaning of the Treaty as evinced by its plain language and by the record of the deliberations of the delegates who drafted the Treaty.

As one of the twenty-three original signatories, and an active participant in the drafting of the Treaty, the Republic of Italy wishes an opportunity to place before the Supreme Court of the United States its understanding of the commitments assumed by the parties to the Treaty as appears from the language thereof, and as revealed by the minutes of the Warsaw Conference.

It is requested, therefore, that the views of the Republic of Italy as expressed in the attached brief *amicus curiae*, be considered by this Court in resolving the question presented by the Petitioner.

Respectfully submitted,

ALFRED C. CLAPP
Counsel for the Republic of Italy

CLAPP & EISENBERG
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

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JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE REPUBLIC OF ITALY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

The Republic of Italy respectfully submits this Brief as *amicus curiae* in support of petitioner Alitalia-Linee Aeree Italiane, S.p.A. The Republic of Italy was one of the original signatories to the Warsaw Convention of 1929 and actively participated in the Conference which drafted the Treaty. In the opinion of the Republic of Italy the Court of Appeals of the United States has achieved a result in direct conflict with the intent of the High Contracting Parties to the Warsaw Convention.

I.

The Court of Appeals held that the liability limitation (for personal injury or death) specified in the Treaty does

not apply when, although a passenger ticket was delivered, the ticket failed, in the Court's opinion, to give notice of the limitation. The parties to the Treaty expressly limited the imposition of the sanction of unlimited liability to cases where no passenger ticket was delivered.[1] The extension of this sanction to cases in which the passenger ticket was delivered without a statement that the transportation is subject to the liability rules of the Convention, was expressly considered and unequivocally rejected by the drafters of the Treaty.[2]

The failure of the parties to impose the sanction of unlimited liability for omission of particulars on a passenger ticket was neither insignificant nor unintentional. These articles were drafted with deliberate care as appears from the following comment by the delegate from the Republic of Italy:

> *"Mr. Giannini—President of the Committee—As I cautioned you, as we go along, we will examine each article, eliminate the little mistakes, which could creep in. We have tried to make a uniform language, but if we have overlooked something, I will be forced to point it out. Of course, the formula must be the same everywhere."*[3]

When the United States adhered to the Warsaw Convention in 1934, it did so with full knowledge of the intent of the original signatories, as plainly revealed on the face of the Treaty. If any doubt existed, the minutes of the Warsaw Conference of 1929 evincing the intent of the

---

[1] 49 Stat. 3015.

[2] IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, pp. 100-101, 129, 168 (1930).

[3] IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, p. 129 (1930).

drafters and original signatories was available. When the Republic of Italy subscribed to the Warsaw Convention, it felt assured that, since this was a multilateral Treaty and, as such, the product of the interests and concerns of many countries, its plain meaning would not be disregarded by courts of the participating countries.

II.

The crucial issue in this case is the vitality of international conventions, in general, and the Warsaw Convention in particular. Article 41 of the Treaty expressly provides the means—and the only means—for changing the Treaty:

> *"Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this Convention to call for the assembling of a new international Conference in order to consider any improvements which may be made in this Convention. To this end he will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such Conference."* [4]

In addition, if one of the participating parties to the Treaty no longer wishes to abide by it, Article 39 provides:

> *"1) Any one of the High Contracting Parties may denounce this Convention by a notification addressed to the Government of the Republic of Poland, which will at once inform the Government of each of the High Contracting Parties.*
>
> *2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only*

[4] 49 Stat. 3023.

as regards the Party who shall have proceeded to denunciation."[5]

No principle of international law can support the proposition that a national court of one party to a Treaty can negate or amend any of the terms of the Treaty except in accordance with the procedures established by the Convention and general concepts of international law.

III.

The decision of the United States Court of Appeals is completely at variance with the understanding of the Republic of Italy as to the commitments of the United States as expressed in the Treaty. The decision is also at variance with the understanding of the United States as to its commitment as expressed in the Treaty. In 1955 the Government of the United States openly took the position that an amendment of the Treaty would be required to extend the sanction of unlimited liability to cases in which the passenger ticket fails to notify the passenger of the applicability of the liability rules of the Convention. The Republic of Italy supported the United States when it urged the amendment of Article 3 of the Warsaw Convention to require notice in the passenger ticket of the limitation of liability. This amendment was adopted at the Hague Conference of 1955.[6] For reasons of its own, the United States chose not to ratify the Hague Protocol. S. Exec. Doc. H, 86th Cong. 1st Sess. (1959); S. Exec. Rept. No. 3, 89th Cong. 1st Sess. (1965).

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[5] 49 Stat. 3022.

[6] International Conference on Private Air Law, ICAO Doc. 7686—LC/140 pp. 3, 13 (1955).

CONCLUSION

It is respectfully submitted that this Court should not permit a Treaty between the United States, Italy, and 91 other countries,[7] to be interpreted in a manner inconsistent with the intent of the parties to the Treaty, as clearly expressed in the language employed and as demonstrated by the history of the Treaty. It is, therefore, urged that the decision of the United States Court of Appeals should be reversed.

Respectfully submitted,

ALFRED C. CLAPP
Counsel for the Republic of Italy

CLAPP & EISENBERG
Of Counsel

[7] Treaties in Force, Department of State Publication 8188, p. 235 (1967).

Certificate of Service

I hereby certify that I have this 21st day of December, 1967, served the foregoing Motion and Brief upon petitioner, respondents, the International Air Transport Association, the Air Transport Association of America, the United States, the United Kingdom of Great Britain and Northern Ireland, and Arnold Holtzman, *amici curiae*, by depositing same in the United States mailbox at 744 Broad St., Newark, N.J., with first class postage prepaid addressed to the respective attorneys of record as follows:

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10015

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

EDWIN LONGCOPE
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

ALFRED C. CLAPP
Counsel for the Republic of Italy

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CANADA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

and

BRIEF OF CANADA *AMICUS CURIAE*

ROBERT MACCRATE,
Counsel for Canada,
48 Wall Street,
New York, N. Y. 10005

ROBERT D. KRUMME,
SULLIVAN & CROMWELL,
New York, N. Y. 10005,
Of Counsel.

December 20, 1967.

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Mertens v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U. S. 816 (1965) 7, 8

Maximov v. *United States*, 373 U. S. 49 (1963) 10

Pan American World Airways, Inc., Conditions of Carriage and Related Traffic Regulations, 24 C.A.B. 575 (1957) 8, 10

Warren v. *The Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965) 7, 8

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Canadian *Carriage by Air Act*, as amended, 12 Eliz. II. Chap. 33 (1963) 1

Convention for the Unification of Certain Rules Relating to Internation Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000; T.S. 876 ..... *passim*

Federal Aviation Act of 1958, 72 Stat. 770, 49 U.S.C. §1382 8

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Other Authorities:

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Dep't of State Press Releases Nos. 110 and 111, May 13 and 14, 1966; 54 Dep't State Bull. 955-57 (1966) 12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CANADA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Canada respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioner.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondents has refused consent.

Canada is a contracting party to the Warsaw Convention* and to the Hague Protocol**. As a contracting party

* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000; T. S. 876; Canadian *Carriage by Air Act*. 1939, c. 12, s. 1. See Canada's Notice of Accession to the Convention dated June 10, 1947, the text of which is annexed as Appendix A.

** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, September 28, 1955. Printed in Civil Aeronautics Board, Aeronautical Statutes and Related Material 324-66 (1963); Canadian *Carriage by Air Act*, as amended, 12 Eliz. II. Chap. 33 (1963). See Canada's Instrument of Ratification of the Protocol dated March 20, 1964, the text of which is annexed as Appendix B.

with the United States to the Convention, Canada has a direct and continuing interest in securing the uniform implementation of the Warsaw Convention in a manner consistent with the intentions of the contracting parties. The decisions below of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York ignore the intentions of the contracting parties, change by judicial fiat a clear and express provision of the Convention embodying the mutual commitments of the contracting governments and are contrary to the uniform construction placed upon this provision by all the contracting parties, including the United States.

Canada has also cooperated with the United States to assure the effectiveness of the special agreement (the so-called "Interim Agreement") developed in Montreal in May 1966 among various air carriers providing for the increase in the limitations of liability applicable under the Convention and Protocol with respect to air carriage to and from the United States.* In consequence of the decisions below, the future operation of the Interim Agreement and its salutary results are in jeopardy.

Canadian air travelers and air carriers, publicly and privately owned, have a profound interest in retaining the benefits for international air travel achieved by the Warsaw Convention in promoting uniformity in ticketing and in regulating air carrier liability. The decisions below threaten to destroy this uniformity.

Canada seeks leave to intervene as *amicus curiae* to voice its objections to the interpretations placed upon the Warsaw Convention by the Courts below and to apprise

* 31 Fed. Reg. 7302 (1966). See Note delivered by the Canadian Embassy in Washington, D.C. to the State Department dated May 12, 1966, the text of which is annexed as Appendix C.

this Court of the serious implications for the future in allowing the decisions below to stand.

For the foregoing reasons, it is respectfully requested that this motion for leave to file a brief as *amicus curiae* be granted.

Dated: December 20, 1967.

Respectfully submitted,

ROBERT MACCRATE,
Counsel for Canada,
48 Wall Street,
New York, N. Y. 10005

ROBERT D. KRUMME,
SULLIVAN & CROMWELL,
New York, N. Y.,
Of Counsel.

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BRIEF OF CANADA AS *AMICUS CURIAE*

Statement

It is the position of Canada, as a signatory to the Warsaw Convention, that the decision below of the majority of the Court of Appeals does not give effect to the intentions of the contracting parties and that, if permitted to stand, would effect a unilateral and substantive amendment in the Convention. Such a judicially imposed amendment could effectively frustrate the recent steps taken to liberalize the Convention's provisions.

Canada submits that

(1) Article 3 of the Convention does not impose a requirement as a condition for limitation of liability that a prospective passenger receive notice

that the transportation is subject to the rules relating to liability established by the Convention,

(2) it was the intention of the contracting parties under Article 3(2) of the Convention that if an air carrier delivers a ticket to a prospective passenger the limitations of liability under the Convention are applicable,[1] and

(3) the delivery of the tickets in the instant cases fulfilled the requirement under Article 3(2) of the Convention.

Canada further submits that the Interim Agreement[2] developed in Montreal in May 1966 under Article 22(1) of the Warsaw Convention (pursuant to which international air carriers stopping in the United States accept liability without regard to fault up to a limit of $75,000) is bottomed upon continued adherence by the contracting parties to the Convention and to its continued implementation in accordance with the intentions of the contracting parties. The interpretation of the Convention in the decisions below, if left standing, taken in conjunction with the carrier's obligations under the Interim Agreement, could result in absolute and unlimited liability being imposed upon the air carrier without regard to fault.

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1. Article 3(2) provides:

"The absence, irregularity or loss of the passenger ticket does not affect the existence of the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability," 49 Stat. 3000, 3015.

2. The Interim Agreement is filed with the Civil Aeronautics Board as C.A.B. Agreement No. 18,900 (Order Series No. E-23680). See 31 Fed. Reg. 7302 (1966). A copy of the text of the Interim Agreement is annexed as Appendix D.

Argument

The Courts below, in their consideration of the airline's ticket involved in this case and in relating it to Article 3 of the Warsaw Convention, expressed two fundamental misconceptions about the Convention: one with respect to the significance of the delivery of the ticket as required by Article 3(2) and the other with respect to the purpose of the enumeration in Article 3(1) of information for inclusion in the ticket.[3]

Under the plan of the Convention, the delivery by the carrier of the passenger's ticket is the act which invokes the full operation of the Convention. As learned commentators have pointed out: "All determinations regarding applicability of the Convention are based on the ticket." Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 500 (1967). These commentators further note: ". . . once the ticket has been issued, it makes no difference to applicability which airline performs the carriage . . ." *id.* at 501. Thus, it is the act of delivering the ticket that is made of controlling significance under Article 3(2).

The notion advanced by the Courts below that the requirement of delivery should be construed as establishing a further and unwritten requirement that the passenger be afforded a "reasonable opportunity" to take steps to protect himself against limitation of liability was adopted from two earlier Court of Appeals cases, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U. S. 816 (1965) and *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965).

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3. The Solicitor General in his argument opposing the petition for a writ of certiorari similarly failed to grasp these aspects of the Convention when he asserted that a literal reading of Article 3(1) would "deprive" that provision of "purpose and meaning." Memorandum for the United States as *Amicus Curiae*, p. 7.

However, in both the *Mertens* and *Warren* cases the Courts were presented with situations where there had in fact been no delivery of a ticket prior to the commencement of the carriers' responsibility for the passengers as laid down in Article 17 of the Convention. Thus the express requirement of Article 3(2) that there be delivery of a ticket had not been complied with before the air travel commenced. The further and indefinite requirement of affording the passenger a "reasonable opportunity" to take some other action, which the Courts in *Mertens* and *Warren* suggested be read into the Convention, was unnecessary to their decisions. The reiteration and expansion of this requirement by the Courts below in the instant cases result in an addition to the Convention which was specifically rejected by the contracting parties.[4]

The further misconception implicit in the decisions below is the notion that Article 3(1), and particularly Article 3(1)(e), has a purpose other than to prescribe a descriptive outline of what the passenger ticket shall include. The declared purpose of the Warsaw Convention was to regulate for international air travel "in a uniform manner"

—"the documents used for such transportation" and
—"the liability of the carrier".
49 Stat. 3000, 3014.

Article 3(1) is not concerned with sanctions, but with describing what, in the interests of uniformity, a passenger ticket for international air travel should contain.

The success of the Convention in this regard is evidenced by the form of ticket involved in the instant cases which was the standard form in general use by substantially all international air carriers, including Canadian air carriers. It was approved by the Civil Aeronautics Board (24 C.A.B. 575 (1957)) pursuant to its powers under the Federal Aviation Act of 1958, 72 Stat. 770, 49 U.S.C. § 1382.

4. A proper construction of the Convention is found, we submit, in Grey v. American Airlines, Inc., 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956).

Disregarding the fundamental concepts of the Convention relating to the delivery and the description of the ticket, the Courts below in their decisions wrote into the Warsaw Convention their own domestic concept of adequate notice as a condition precedent to the application of the limitation on liability provided for in the Convention. Any such change in the Convention is a subject for multi-lateral negotiation among the contracting parties, not for judicial fiat.[5]

The Courts effected this amendment by lifting one of the descriptive provisions in Article 3(1) to the status of a condition which must be met under Article 3(2), in order for the air carrier to avail itself of the provision in the Convention relating to limitation of liability. There is no basis in the Convention for singling out Article 3(1)(e) as was done by the Courts below. If such decisions are permitted to stand, there can be no logical reason for excluding the other subparagraphs of Article 3(1) as conditions which also would have to be met by the air carrier in order for it to avail itself of the provisions relating to limitation of liability.

Moreover, this judicially imposed requirement creates uncertainty for the air traveler as to his rights and as to the availability of the limitation of liability defense to the air carrier and invites unending litigation and a proliferation of interpretations, including inconsistencies among the various jurisdictions, as to what constitutes adequate

5. Such an amendment to Article 3(2) of the Convention should not be confused with unilateral steps properly taken by contracting parties within their own jurisdictions to regulate the manner in which carriers bring to the attention of passengers the applicability of the Convention's limitations on liability. The C.A.B. on behalf of the United States has properly taken such unilateral action in regulating the carriers' activities within the United States. 14 C.F.R. §221.175 (1967). But, it is one thing for the United States to require carriers to take certain action within the United States; it is quite a different matter for the United States, either by its responsible administrative agency or by its courts, unilaterally to impose as a sanction for failure to comply with these regultions the removing of the Convention's limit of liability.

notice.[6] Such judicial rewriting of the Convention is incompatible with the principles laid down by this Court with respect to the effect and interpretation of treaties.

As a treaty made under the authority of the United States the Warsaw Convention is a part of the "supreme Law of the Land". U. S. Const. art. VI, § 2. It may not be vitiated or amended in its implementation by reading into it requirements of local domestic law relating to notice and providing for sanctions for failure to comply with such local requirements. The plain language of Article 3(2) permits limitation of liability in all instances except where no ticket is delivered by the carrier.

Deviation from the purport of language and clear intention of the contracting parties to a treaty is not permissible. *The Amiable Isabella,* 19 U. S. (6 Wheat.) 1, 71 (1821); *Maximov* v. *United States,* 373 U. S. 49, 54 (1963).

Moreover, in ascertaining the meaning of a treaty it is appropriate to look to the negotiations of the contracting parties and to their own practical construction of the treaty. *Factor* v. *Laubenheimer,* 290 U. S. 276, 294-95 (1933); see also *Block* v. *Campagnie Nationale Air France,* Docket No. 21609, CA 5, Nov. 8, 1967 (Slipsheet, pp. 28-31).

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6. One need not look beyond the decisions of the Courts below for an example of the problems created by the strained interpretation of Article 3(2). The District Court determined that the language on the ticket in question in this case would have consituted adequate notice had it been readable (253 F. Supp. 237, 243 n. 7). On the other hand, despite the fact that the Civil Aeronautics Board had approved the very form of passenger ticket involved in these cases, 24 C.A.B. 575, the Court of Appeals stated that it was highly questionable whether the language contained on the ticket would have constituted adequate notice even if readable (370 F. 2d 508, 514 n. 10). The differing opinions on the question of adequate notice, both as to substance and form, are limited only by the number of courts willing to entertain this question in the applicable jurisdictions of the various contracting parties.

The history of the negotiations in the period 1925 to 1929, treated in the petitioner's brief, shows that the contracting parties expressly rejected the language which the Courts below read into the Convention. Moreover, the proceedings at The Hague in 1955, similarly treated in petitioner's brief, confirm that the practical construction given the Convention by the United States as well as other contracting parties was contrary to the interpretation of the Courts below.

The recent judicially imposed requirement of notice under Article 3(2) of the Convention is particularly untenable when viewed with the 1966 Interim Agreement among various international air carriers (see Appendix D), which was prompted by the action taken by the United States to withdraw from the Convention.

On November 15, 1965, the United States gave notice of its denunciation of the Warsaw Convention. On the same day it issued a press release stating it would be prepared to withdraw the notice of denunciation if there were a reasonable prospect of an international agreement on limits of liability in the area of $100,000 per passenger and suggesting that, pending such international agreement, an arrangement among principal international airlines could be arranged waiving the limits of liability up to $75,000 per passenger. 53 Dep't State Bull. 923 (1965). The effective date of the denunciation, as provided in Article 39 of the Convention, was to be May 15, 1966.

Immediately prior to the effective date, Canadian and American air carriers, as well as other air carriers, entered into the Interim Agreement, the recognized purpose of which was to provide a basis upon which the United States would withdraw its notice of denunciation of the Convention. 31 Fed. Reg. 7302 (1966).

The Interim Agreement embodies two significant provisions:

1. It increased the limit of liability from approximately $8,300 to $75,000 per person on transportation to, from or with an agreed stop in the United States;[7] and

2. It provided for waiver by the air carriers of Article 20(1), which would otherwise enable the air carrier to avoid liability if it proved that it took necessary steps to avoid the damage or proved that it was impossible to take such measures.

Thus, the Interim Agreement resulted in the imposition of absolute liability of up to $75,000 upon the signatory carriers for all provable damages assuming the passenger did not cause or contribute to the damages. In addition, the Agreement set forth an exact form of notice as well as the type point to be used on or attached to the ticket, ticket envelope, or a piece of paper placed in the ticket envelope or attached to the ticket.

On May 11, 1966 the Canadian Air Transport Board telegraphed the Civil Aeronautics Board that on the assumption the United States was withdrawing denunciation of the Warsaw Convention the Air Transport Board would accept filings incorporating the provisions of the Interim Agreement. In a subsequent Note to the State Department, the Canadian Embassy informed the United States that the text of this telegram reflected the views of

7. $58,000 in jurisdictions where provision is made for separate award of cost of litigation.

the Canadian Government in this matter. See Appendix C. On May 16, 1966, the United States announced its decision to withdraw its notice of denunciation.[8] On the same day, the Civil Aeronautics Board approved the Interim Agreement by Order, stating:

> "The U. S. Government has concluded that such arrangements [*i.e.*, the Interim Agreement] warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. *Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom,* but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States." 31 Fed. Reg. 7302 (1966). (Emphasis supplied.)

The Canadian Government in its diplomatic note at the time expressed the hope that the Interim Agreement would be replaced by appropriate amendment to the Warsaw Convention and the Hague Protocol through diplomatic conference as soon as possible. See Appendix C.

If the decision below, and the reasoning upon which it is based, is not reversed, the signatories to the Interim Agreement, having waived any defenses they otherwise might have had under Article 20(1) of the Convention, would find themselves faced with uncertainty as to their limitation of liability, which would be dependent upon a showing that "adequate notice" of the Convention was contained on the ticket. The result would be absolute

8. Dep't of State Press Releases Nos. 110 and 111, May 13 and 14, 1966; 54 Dep't State Bull. 955-57 (1966).

but limited liability (up to $75,000) by reason of the Interim Agreement, but potential absolute and unlimited liability were the notice deemed by any court to be "inadequate". Thus, the Courts below, by their arbitrary construction of Article 3 have added an abiding uncertainty regarding the application of the Convention and thereby have jeopardized the recent steps taken, as reflected in the Interim Agreement, to liberalize the Convention provisions.

CONCLUSION

The decision and judgments below should be reversed.

Dated: December 20, 1967.

Respectfully submitted,

ROBERT MACCRATE,
Counsel for Canada,
48 Wall Street,
New York, N. Y. 10005.

ROBERT D. KRUMME,
SULLIVAN & CROMWELL,
New York, N. Y.
Of Counsel.

APPENDIX A

Canadian Legation,
Warsaw,
June 10th, 1947

No. 2.
Excellency,

I have the honour to inform you that the Government of Canada has decided to accede to the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12th, 1928; and desires hereby to give Your Excellency notice of this accession, in accordance with the provisions of Article 38 of that Convention. In accordance with the terms of the Additional Protocol the Government of Canada declares at the same time that the first paragraph of Article 2 of the Convention shall not apply to international carriage by air performed directly by Canada.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(K. P. Kirkwood)
Charge d'Affaires a.i. of Canada

His Excellency
Mr. Zygmunt Modzelewski,
Minister for Foreign Affairs,
Warsaw.

APPENDIX B

I, PAUL MARTIN,
Secretary of State for External Affairs
in the Government of Canada
do hereby certify that the Government of Canada ratifies the Protocol done at The Hague on 28 September 1955, and signed on behalf of the Government of Canada on 16 August 1956, to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929.

IN WITNESS WHEREOF I have signed and sealed this Instrument of Ratification.

Done at Ottawa this 20th day of March, 1964.

/s/ Paul Martin
Secretary of State
for External Affairs

APPENDIX C

No. 138

The Canadian Ambassador presents his compliments to the Secretary of State and has the honour to refer to recent discussions concerning the limitation of liability of airlines in international traffic for the death or injury to passengers.

There is set out below the text of a telegram sent by the Air Transport Board of Canada to the United States Civil Aeronautics Board which reflects the views of the Canadian Government in this matter.

"Board has received and reviewed number of requests for short notice filings setting out terms of IATA Agreement on increased limits of liability from international carriers, including Air Canada and Canadian Pacific Airlines, for effect not later than May 16, 1966. At request of Air Canada and Canadian Pacific Airlines and on assumption U.S.A. will be withdrawing denunciation Warsaw Convention, we hereby advise you that Board will accept these filings. Board hopes IATA Air Lines Agreement will be replaced by appropriate amendment to Warsaw Convention and Hague Protocol through diplomatic conference as soon as possible."

A. de W. MATHEWSON
[SEAL]

Washington, D.C.,
May 12, 1966.

APPENDIX D

AGREEMENT

The undersigned carriers (hereinafter referred to as "the carriers") hereby agree as follows:

1. Each of the carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government.

"The carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the carrier agrees that, as to all international transportation by the carrier as defined in the said Convention which, or said Convention as amended by said Protocol, according to the contract of carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of U.S. dollars 75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. dollars 58,000 exclusive of legal fees and costs.

(2) The carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol. Nothing herein shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention or the Convention as amended by the Hague Protocol and by the special contract described in para one, the following notice, which shall be printed in type as least as large as 10 point modern type and in ink contrasting with the stock in (I) each ticket, (II) the piece of paper either placed in the ticket envelope with the ticket or attached to the ticket, or (III) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGERS
ON LIMITATION OF LIABILITY

"Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United

States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of (name of carrier) and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US dollars 75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US dollars 8,290 or US dollars 16,580.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carriers liability under the Warsaw Convention or such special contracts of carriage, for further information please consult your airline or insurance company representative."

2A) The expression "(name of carrier) and certain other carriers" may be replaced by the expression "certain carriers" in above notice.

3. This agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as

amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This agreement may be signed in any number of counterparts all of which shall constitute one agreement. Any carrier engaged in carriage to which the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol applies may become a party to this agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other carriers parties to the agreement.

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

December 21, 1967

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Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E. 2d 880 (1949) 7, 25, 33

Samuel Montague & Co. v. Swiss Air Transport Co. [1966], 1 Lloyd's List L.R. 323 33
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Valentine v. United States, 299 U.S. 5 (1936) 17

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Constitutional Provisions, Treaties & Statutes:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 ..... *passim*

United States Constitution Amendment VII 33

Other Authorities:

IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838 (1930) ..... *passim*

I International Conference on Private Air Law, ICAO Doc. 7686-LC/140 (1955) 15, 31

II International Conference on Private Air Law, ICAO Doc. 7686-LC/140 (1955) 6, 16, 31, 32

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Goedhuis, National Airlegislations and the Warsaw Convention (1937) 13, 14

S. Doc. Exec. G, 73d Cong. 2d Sess. (1934) 27

S. Exec. Doc. H, 86th Cong. 1st Sess. (1959) 16

S. Exec. Rept. No. 3, 89th Cong. 1st Sess. (1965) 16

Shawcross and Beaumont On Air Law (3d ed. 1966) 13, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals (A. 89a) is reported at 370 F. 2d 508. The opinion of the District Court (A. 72a) is reported at 253 F. Supp. 237.

Jurisdiction

The judgments of the Court of Appeals were entered December 16, 1966 (A. 103a-112a). Timely petitions for rehearing and rehearing *in banc* were denied February 6, 1967 (A. 113a-118a). The petition was filed March 20, 1967 and was granted November 6, 1967 (A. 120a). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Treaty Involved

The Treaty of the United States involved is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929 (hereinafter referred to as the Warsaw Convention). Adherence by the United States was declared June 27, 1934, and the Treaty became effective as to the United States October 29, 1934. 49 Stat. 3000. The relevant Articles of the Treaty are set forth, both in the official French and in English, in the Appendix to this brief, commencing page 37.

Questions Presented

1. Whether Article 3(2) of the Warsaw Convention requires, under the sanction of depriving the carrier of those treaty defenses which exclude or limit its liability, the inclusion in the passenger ticket of either the statement in Article 3(1)(e) or a notice that the Treaty limits the liability of the carrier?

2. Whether the statement in the baggage checks delivered by petitioner, as to the applicability of the liability rules of the Warsaw Convention, satisfies the compulsory requirements of Articles 4(3)(h) and 4(4)?

3. Whether the question of the readability of the passenger tickets and baggage checks should be submitted to a jury?

Statement

On February 26, 1960, a DC-7C aircraft owned and operated by petitioner Alitalia crashed shortly after takeoff from Shannon Airport, Ireland, while on a regularly scheduled flight from Rome, Italy to New York, U. S. A. These

five diversity suits[1] were brought by respondents to recover damages for wrongful death, personal injuries and property loss sustained by thirteen of the forty passengers on board the aircraft at the time of the accident (A. 90a). It was undisputed that the passenger tickets and baggage checks of each of these thirteen passengers provided for "international transportation" within the meaning of Article 1 of the Warsaw Convention and, therefore, that the rights of the parties are governed by the Convention. 370 F. 2d at 510 (A. 91a).

In answering the complaints, Alitalia pleaded several affirmative defenses based upon Articles 20 and 22 of the Convention, pursuant to which Alitalia sought to exclude or limit its liability for the damage alleged (A. 4a-9a). Prior to trial, respondents moved for partial summary judgment dismissing these defenses, asserting that Alitalia had not effectively notified the passengers of the applicability of the Treaty to their transportation and that, therefore, the provisions of the Treaty excluding or limiting Alitalia's liability were unavailable (A. 10a-18a). The District Court agreed with respondents and granted their motion. 253 F. Supp. at 243 (A. 83a). The opinion of the District Court included a certification under 28 U. S. C. 1292(b), 253 F. Supp. at 243, and Alitalia's application for leave to appeal was granted by the Court of Appeals (A. 91a).

By a vote of two to one, Judge Moore dissenting, the Court of Appeals affirmed the order of the District Court (A. 100a). A petition for rehearing was likewise denied (A. 113a-115a). Rehearing *in banc* was denied by a vote of six to three, Judges Moore, Friendly and Hays voting to grant (A. 116a-118a).

[1] Respondents are citizens of the State of New York and petitioner is an Italian corporation with its principal place of business in Rome, Italy. 28 U. S. C. 1332(a)(2). The five separate suits were consolidated in the District Court. (A. 90a).

Both in the District Court and the Court of Appeals, respondents argued that, under Articles 3 and 4 of the Convention, the carrier must notify its passengers that the Treaty applies to their transportation and limits the carrier's liability (A. 16a). In the absence of such notice, according to respondents, the sanctions in Articles 3(2) and 4(4) of the Convention apply, and the carrier may not exclude or limit its liability (A. 16a-17a). Respondents also contended that, if the Treaty requires this notice, the passenger tickets and baggage checks delivered by Alitalia did not give "adequate notice", because the statement in the tickets and checks as to the applicability of the liability rules of the Treaty was not definite, noticeable, readable and understandable to a layman (A. 17a-18a, 63a-65a).

Alitalia contended in the Courts below that the application of the provisions of the Treaty does not depend upon any concepts of notice. In support of this position, Alitalia argued that the Convention itself does not require the inclusion in the passenger ticket and baggage check of any notice that the Treaty excludes or limits the carrier's liability in the event of an accident. Alitalia contended, however, that in any event the passenger tickets and baggage checks delivered in this case, in fact, contained all of the particulars listed in Articles 3 and 4 of the Convention, including a statement as to the applicability of the rules relating to liability established by the Convention (A. 19a-57a, 66a-69a).

The Court below, rejecting a literal reading of the plain language of the convention, and in disregard of the drafting history, held that the provisions of the Convention excluding or limiting liability do not apply unless the passenger tickets and baggage checks contain a notice that the Convention limits the carrier's liability in the event of an accident. 370 F. 2d at 511-513 (A. 94a-97a). The Court

also held that the passenger tickets and baggage checks delivered by Alitalia did not give adequate notice because the statement as to the applicability of the liability rules of the Convention was printed in type too small to be readable. 370 F. 2d at 513-514 (A. 98a-100a).

Summary of Argument

The decision of the Court below is in direct conflict with the clear intent of the parties to the Warsaw Convention, as expressed both in the plain language of the Treaty and its drafting history.

The Warsaw Convention was adopted to unify certain rules relating to the liability of the carrier in international air transportation and the use of transportation documents. Chapter II of the Convention relates to the transportation documents, namely, the passenger ticket, baggage check and air waybill. While the Convention does not specify the form of documents to be used, Articles 3, 4 and 8 do list certain particulars for inclusion in the passenger ticket, baggage check and air waybill, respectively. One of the particulars, which is listed in Articles 3(1)(e), 4(3)(h) and 8(q), is:

> *"A statement that the transportation is subject to the rules relating to liability established by this convention."* 49 Stat. 3015-16.

Articles 4(4) and 9 make the inclusion of this statement in the baggage check and air waybill compulsory by imposing a sanction against the carrier where the statement is omitted. This sanction, when applicable, provides that the carrier shall not be entitled to exoneration or limitation of its liability under the Convention. Articles 4(4) and 9 also impose this sanction against the carrier if no baggage

check is delivered or air waybill made out. 49 Stat. 3015, 3017.

In marked contrast, Article 3 does not impose any sanction against the carrier if the statement listed in Article 3(1)(e) is omitted from the passenger ticket. Article 3(2) imposes the sanction only where no passenger ticket is delivered. 49 Stat. 3015.

The drafting history of the Convention demonstrates clearly that the parties did not intend that the sanction in Article 3(2) extend as far as the sanction in Articles 4(4) and 9. A preliminary draft of the Convention provided that the sanction in Article 3 apply where the passenger ticket omitted the statement as to the applicability of the liability rules of the Convention. After debate, however, the delegates to the Warsaw Conference deleted from the draft of Article 3 that language which would have imposed the sanction where the statement listed in Article 3(1)(e) is omitted from the passenger ticket. IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, pp. 100-101, 167-8 (1930).

In 1955, acting on a proposal of the United States, the Hague Conference amended Article 3(2) to extend the sanction to cases where the passenger ticket fails to contain a statement that the Convention may be applicable and that the Convention limits the liability of the carrier. II International Conference on Private Air Law, ICAO Doc. 7686—LC/140, p. 3 (1955). This and other amendments to the Treaty adopted at the Hague Conference, however, do not apply to the case at bar, since the Hague Protocol amending the Warsaw Convention is not in effect as to the United States.

The Court below, by judicial decision, has written into the Treaty a provision which the plain language of the Treaty itself excludes and which the parties to the Con-

vention had expressly considered and flatly rejected. In addition, the Court below has accomplished what the parties to the Treaty, including the United States, recognized could only be accomplished by treaty amendment.

Application of the provisions of the Warsaw Convention is not based on any concept of notice. *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966); *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Ross* v. *Pan American Airways, Inc.*, 299 N.Y. 88, 85 N.E. 2d 880 (1949). Nevertheless, the Court below held that the provisions of the Convention excluding or limiting the carrier's liability do not apply unless the passenger ticket and baggage check give the passenger:

> "notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially." 370 F. 2d at 513.

The Court below has also held that the standard airline passenger ticket and baggage check delivered by Alitalia does not satisfy what it considered to be "notice" requirements of the Convention, even though the ticket and baggage check contained the statement listed in Articles 3(1)(e) and 4(3)(h) of the Convention. The Court below concluded that the passenger ticket and baggage check delivered by Alitalia was ineffective to give "notice" because of the size of the print of the statement and its location on the ticket. In so holding, the Court below has gone counter to every reported case which has considered the adequacy of this statement in the light of treaty requirements, whether it appears in the passenger ticket, baggage check or air waybill.

In any event, the question of readability of the passenger ticket and baggage check should be decided by a jury.

ARGUMENT

I

The plain language of the Warsaw Convention evidences a clear intent that the sanction of absolute unlimited liability in Article 3(2) applies only where no passenger ticket is delivered. No rule of treaty construction permits the extension of this sanction to cases where the delivered passenger ticket fails to contain any of the particulars listed in Article 3(1).

The best evidence of the intent of the parties to the Warsaw Convention is the language employed. As stated by Judge Moore in his dissenting opinion in the Court below:

> *"The language of the treaty (referred to as the Warsaw Convention) is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem."* 370 F. 2d at 515 (A. 100a).

As its official title indicates, the Warsaw Convention was concluded in order to unify certain rules relating to international transportation by air. 49 Stat. 3014. In the words of the delegate from Great Britain, Sir Alfred Dennis:

> *"The object of this convention is to insure the uniformity of the law. . . ."*[1]

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[1] IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, p. 58 (1930). This document contains all of the recorded Minutes of the Warsaw Conference, and will be cited hereinafter as *"Warsaw Minutes,* ICAO Doc. 7838." The Minutes are recorded in French and all translations in this brief are the Petitioner's.

The preamble to the Convention recognizes "the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." 49 Stat. 3014.

Chapter II of the Convention deals with the subject of transportation documents, namely, the passenger ticket, baggage check and air waybill. The Convention does not specify the form of these documents. The preliminary draft of the Convention did contain an Article providing for the use of certain forms of transportation documents, examples of which were appended to the draft. However, this Article and the appended forms were deleted after the delegates determined that the Convention should not require the use of any specific form of transportation documents. *Warsaw Minutes,* ICAO Doc. 7838 p. 110. The delegate from France, M. Ripert, summed up the intent of the Warsaw Conference in this regard when he said:

> *"There is a convention and then some forms. These forms are not compulsory for anyone. The airline companies are free to adopt any transportation documents they want. If the conference expresses a wish, it can only be this one: 'that the airline companies adopt a uniform form'."* *Warsaw Minutes,* ICAO Doc. 7838 p. 110.

The parties to the Convention did determine, however, that it should be compulsory to use transportation documents for the carriage of passengers, baggage and cargo. Thus Article 3(1) states that the carrier "must deliver" a passenger ticket and Article 4(4) states that the carrier "must deliver" a baggage check. 49 Stat. 3015-16. Article 5 provides for the making out of an air waybill for the carriage of goods. 49 Stat. 3016. The use of a passenger ticket,

baggage check and air waybill is made compulsory by Articles 3(2), 4(4) and 9. These Articles contain a sanction depriving the carrier of the benefit of the provisions of the Convention which exclude or limit liability in the event passengers, baggage or cargo are accepted for transportation without a passenger ticket or baggage check having been delivered, or an air waybill having been made out. 49 Stat. 3015, 3016, 3017.

With regard to the contents of the transportation documents, Articles 3(1), 4(3) and 8 list several particulars for inclusion in the passenger ticket, baggage check and air waybill, respectively. Where the parties to the Treaty determined that it should be compulsory for the transportation documents to contain certain of the listed particulars, they did so by imposing the same sanction for the failure of the document to contain the specified particulars, as is imposed where no document is delivered. Thus, the sanction in Article 4(4), with regard to the baggage check, provides:

> *"Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."* 49 Stat. 3015-16.

The particular set out in Article 4(3)(h) is: "A statement that the transportation is subject to the rules relating to liability established by this convention." 49 Stat. 3015.

Similarly, the sanction in Article 9 with regard to the air waybill, provides:

> *"If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i),*

inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability." 49 Stat. 3017.

The particular set out in Article 8(q) is the identical statement as set forth in Article 4(3)(h).

The sanction in Article 3(2), however, with regard to the passenger ticket, is substantially different from the sanctions in Articles 4(4) and 9, and is explicitly limited to the case of non-delivery of a passenger ticket. Unlike the sanctions in Articles 4(4) and 9, the sanction in Article 3(2) does not make it compulsory for the passenger ticket to include any of the particulars listed in Article 3(1). The sanction in Article 3(2) provides:

"Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." 49 Stat. 3015.

In marked contrast are the sanctions in Articles 4(4) and 9, which apply not only for non-delivery of the baggage check or air waybill, but also for the failure of the delivered document to contain certain specified particulars listed in Articles 4(3) and 8. Thus, the inclusion in the baggage check and air waybill of a statement that the transportation is subject to the liability rules of the Convention, which is the particular listed in Articles 4(3)(h) and 8(q), is made compulsory by the sanctions in Articles 4(4) and 9. No comparable language in Article 3(2) makes it compulsory for the passenger ticket to contain the identical statement, which is the particular listed in Article 3(1)(e).

It is clear from a comparative analysis of the plain language of Articles 3(2), 4(4) and 9, that the parties to the

Convention intended to limit the imposition of the sanction in Article 3(2) to cases of non-delivery of the passenger ticket. The parties were explicit in extending the sanction in Articles 4(4) and 9 to cases where the baggage check and air-waybill failed to contain certain specified particulars. There is no such extension of the sanction in Article 3(2).

This clear distinction between Article 3(2) and Articles 4(4) and 9 was recognized by the District Court in *Grey v. American Airlines, Inc.*, 95 F. Supp. 756 (S. D. N. Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956). Plaintiff argued in that case that the sanction of Article 3(2) should apply because the passenger tickets did not contain the "agreed stopping places", which is the particular listed in Article 3(1)(c). The question before the Court was:

> *"whether Article 3(2) means that unless a ticket with all the particulars as set forth in Article 3(1), is delivered, the carrier's liability is unlimited."* 95 F. Supp. at 758.

The Court resolved this question solely by reference to the terms of the Convention itself. After analyzing the language of the Convention, particularly that contained in Articles 3(2), 4(4) and 9, the Court concluded:

> *"Article 3(2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4(4) and 9. I must conclude that this omission or difference is most significant. For I cannot agree with plaintiff's argument that Article 3(2) intends that the ticket delivered contain the items set forth in Article 3(1), when those who drafted the treaty were so explicit in this regard in Articles 4(4) and 9."* 95 F. Supp. at 758.

The *Grey* case was followed by the Queen's Bench Division in *Preston* v. *Hunting Air Transp. Ltd.*, [1956] 1 Q. B. 454, where the Court held that the omission of the agreed stopping places from the passenger ticket did not mean that no passenger ticket had been delivered within the meaning of Article 3(2). After comparing the language of Articles 3, 4, 8 and 9 of the Convention, and particularly the sanction provisions, the Court stated:

> *"Having regard to the arguments I have heard I have no doubt in the present case in coming to the conclusion that the fact that this passenger ticket was deficient in that it did not contain the names of agreed stopping places did not mean that no ticket had been delivered, and did not mean that the plaintiffs could take advantage of article 3(2) and pursue their action without any limitation on the amount set out in article 22. . . ."* [1956] 1 Q.B. 454 at 461.

The leading writers on the Warsaw Convention are in agreement that the Treaty does not apply the sanction in Article 3(2) where the passenger ticket fails to contain any of the particulars listed in Article 3(1). DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW (1954); GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION (1937); SHAWCROSS AND BEAUMONT ON AIR LAW (3d ed. 1966).

Goedhuis states with regard to the sanction in Article 3(2):

> *"The sanction provided for, will only be applied when the carrier has not issued a ticket. As regards the form and the contents of the ticket, no liability devolves on the carrier from the Warsaw Convention. By virtue of the Warsaw Convention, the carrier is free to issue any ticket he wishes, without having to*

include the particulars regarded in article 3." GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 153 (1937).

In comparing the sanction in Article 4(4) regarding the baggage check, with the sanction in Article 3(2), Goedhuis states:

> *"Hitherto, we have only considered the sanction with regard to the baggage check. With regard to the passenger ticket, the sanction has even less value. As it has already been said, the carrier, by virtue of the Warsaw Convention, will be deprived of the benefits of the Convention, if he fails to deliver a ticket, but he will not be deprived of them if he has delivered a ticket which is however not in conformity with the provisions of sub-paragraph 1 of article 3 regarding the form of the ticket. Consequently, he can deliver any kind of ticket, without including any of the particulars required by the Warsaw Convention, since the Convention has not provided for any sanction against such omissions."* GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 156-7 (1937).

Drion states, in comparing the sanction in Article 3(2) with that contained in Articles 4(4) and 9:

> *"Both the wording of Article 3(2), when compared with that of Articles 4(4) and 9, and the history of the provision make it abundantly clear that the framers of the Convention meant to impose the sanction with respect to the ticket only in case of a complete failure to deliver a ticket, and did not want to attach the sanction to the omission of the prescribed particulars. This raises the question of which condition should be*

fulfilled for a slip of paper to become a ticket, the delivery of which will be sufficient for the purpose of Article 3(2). It is believed that any document will do which shows itself to be 'a ticket' for the transportation concerned." DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW ¶251 (1954).

Shawcross and Beaumont in their treatise have also recognized this important distinction between the sanction in Article 3(2) and the sanction in Articles 4(4) and 9. SHAWCROSS AND BEAUMONT ON AIR LAW 439 (3d ed. 1966).

The negotiations surrounding the adoption of the Hague Protocol in 1955, amending the Warsaw Convention in certain respects, remove any doubt that the sanction in Article 3(2) does not apply where the passenger ticket omits the statement listed in Article 3(1)(e). See generally, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 (1955). At the Hague Conference, the parties to the Warsaw Convention agreed on an amendment to Article 3(2) extending the sanction to cases where the delivered passenger ticket fails to contain a statement which notifies the passenger that the Convention may be applicable and that the provisions of the Convention limit the carrier's liability. This amendment resulted from a proposal put forth by the United States at the Conference that the Treaty be amended to make it mandatory for the carrier to notify its passengers that the provisions of the Convention, if applicable, limit the carrier's liability. I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 pp. 81, 120 (1955).

The amendment to Article 3(2) adopted at the Hague Conference reads:

"2. The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the con-

tract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22." II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 3 (1955). (Underscoring added).

The Hague Protocol, however, has never been ratified by the United States, is not in force as to the United States and therefore, does not apply to the case at bar. S. EXEC. Doc. H, 86th Cong. 1st Sess. (1959); S. EXEC. REPT. No. 3, 89th Cong. 1st Sess. (1965).

The negotiations surrounding the adoption of the Hague Protocol were considered decisive by the Court in *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), in construing Article 2 of the Warsaw Convention. The question was whether transportation performed under contract for the Military Air Transport Service (MATS) of the United States was subject to the Warsaw Convention. The Court concluded that it was. This conclusion, in the words of the Court, was "unavoidable", because the parties to the Treaty, including the United States, had considered it necessary to amend the Treaty in order to remove MATS flights from the scope of the Warsaw Convention.

The parallel to the case at bar is clear. In order for the sanction in Article 3(2) of the Warsaw Convention to be

applied to cases where the passenger ticket omits the particular listed in Article 3(1)(e), the parties considered it necessary to amend the Treaty as proposed by the United States. In spite of this clear understanding of the parties as to the meaning of the Convention, the Court below has accomplished the same result by judicial decision. As characterized by Judge Moore in his dissenting opinion:

> *"The majority in their opinion indulge in judicial treaty-making.*
>
> • • • • • •
>
> *"The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it."* 370 F.2d at 515 (A. 100a-101a).

In the interpretation of a treaty, this Court has consistently refused to construe the language employed to bring within the confines of the treaty a subject the parties clearly intended to omit, or to achieve a result inconsistent with the intention of the parties as expressed in the language of the treaty. *Maximov* v. *United States*, 373 U. S. 49 (1963); *Valentine* v. *United States*, 299 U. S. 5 (1936); *Factor* v. *Laubenheimer*, 290 U. S. 276 (1933); *Santovincenzo* v. *Egan*, 284 U. S. 30 (1931). As stated in *Maximov* v. *United States*, 373 U. S. 49 (1963):

> *"Moreover, it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."* 373 U. S. at 54.

In summary, the plain language of Article 3(2) of the Warsaw Convention evidences the clear intention of the parties that the sanction applies only where the carrier accepts a passenger without a passenger ticket having been delivered. No rule of construction permits the extension of the sanction in Article 3(2) to cases where the passenger ticket delivered fails to contain, in effect, the statement in Article 3(1)(e). Related Articles 4(4) and 9 explicitly make the sanction applicable not only where no baggage check is delivered, or no air waybill is made out, but also where these documents fail to contain certain specified particulars among those listed in Articles 4(3) and 8. There is no similar language in Article 3(2) extending this sanction to cases where the passenger ticket fails to contain any of the particulars listed in Article 3(1).

What Justice Story said in *The Amiable Isabella*, 19 U. S. (6 Wheat.) 1 (1821) is particularly appropriate:

> "... *[T]his Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.*
>
> "... *[T]his Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have*

chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, . . ." 19 U. S. (6 Wheat.) at 71-73.

II

The drafting history of the Warsaw Convention confirms the intention of the parties to apply the sanction in Article 3(2) only where no passenger ticket is delivered. Article 3 of the preliminary draft of the Convention contained language also imposing this sanction where the passenger ticket did not conform to the Convention. However after consideration by the delegates this language was deleted and Article 3(2) as adopted applies the sanction only for non-delivery of the passenger ticket.

The preliminary draft of the Convention was the product of four years work, and had been submitted to the delegates a year before the Warsaw Conference was convened. *Warsaw Minutes,* ICAO Doc. 7838 pp. 159-60.

The Belgian delegate, M. deVos, presented the report on the preliminary draft to the delegates at the first working session of the Conference. In describing Chapter 2 of the draft which dealt with the subject of transportation documents, M. deVos stated:

"The essential thing, in this regard, is the sanction, the sanction foreseen for the three documents and which consists of withdrawing from the carrier who transports passengers or merchandise without documents, or with documents not conforming to the convention, the benefit of the advantages laid down by

the convention." Warsaw Minutes, ICAO Doc. 7838 p. 15.

M. deVos reported to the Conference that while the preliminary draft of the Convention contemplated the use of a document for the transportation of passengers "necessarily different" from those to be used in the transportation of baggage and cargo, the sanction to be imposed for the transportation of passengers without a ticket, or with a ticket not in conformity with the proposed convention, was to be "identical to that contemplated for the transportation of baggage and cargo." *Warsaw Minutes,* ICAO Doc. 7838 p. 161. Article 3 of the preliminary draft, as presented to the Conference, read:

> *"In the transportation of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars:*
>
> *a) The place and date of issue;*
>
> *b) The places of departure and destination;*
>
> *c) The route to be followed (via) agreed stopping places;*
>
> *d) The name and address of the carrier or carriers.*
>
> *The passenger ticket must contain, above all, a clause stipulating that the transportation is subject to the rules relating to liability established by this Convention.*
>
> *The absence, irregularity or loss of this passenger ticket shall not prejudice the existence or validity of the contract of transportation.*
>
> *If, for international transportation, the carrier accepts the passenger without a passenger ticket having*

been established, or if the ticket does not contain the particulars indicated above, the contract of transportation will be none the less subject to the rules of this Convention, but the carrier will not have the right to avail himself of those provisions of the Convention which exclude, in whole or in part, his direct responsibility or that derived from the mistakes of his employees." Warsaw Minutes, ICAO Doc. 7838 pp. 167-168. (Underscoring added).

This preliminary draft of Article 3 underwent substantial revision and redrafting during the course of the Conference before it was adopted by the delegates and incorporated in the Treaty. *Warsaw Minutes,* ICAO Doc. 7838 pp. 100-104, 129. The most significant revision developed from the proposal of the Greek delegate that the application of the sanction in the preliminary draft of Article 3 be restricted. He regarded the sanction as too severe a penalty for the mere omission of one of the listed particulars from the passenger ticket. He therefore proposed that the sanction in Article 3 be amended to read:

"If the passenger ticket does not contain one of the above mentioned particulars, then the carrier will be deprived of this right [to exclude in whole or in part his responsibility] *in the case, where, according to the court's judgment, damage will have been caused to the other party by this act". Warsaw Minutes,* ICAO Doc. 7838 p. 197.

He also proposed that the sanction relative to the contents of the baggage check and the air waybill be similarly amended.

The Preparatory Commission, which was established to consider all proposed amendments before submission to the delegates, did not adopt the wording of the amendment proposed by the Greek delegate. The Conference was determined not to leave the resolution of matters of substance under the Convention to national laws. *Warsaw Minutes*, ICAO Doc. 7838 pp. 44-45. The commission, however, went further and agreed to delete entirely from Article 3 the language which would have extended the sanction to cases where the passenger ticket omits any of the listed particulars. The following are the pertinent portions of the comments of the delegates when the revised Article 3 was presented to the Conference for adoption:

> *"M. deVos, Reporter. Gentlemen, Article 3 relates to the passenger ticket and what should be found on the ticket.*
>
> • • • • •
>
> *"These proposals [the listing of additional particulars] were rejected not because they did not figure under the title of passenger transportation: in fact these particulars were there. But because of an observation by the Greek delegate which is the following:*
>
> *The last line of the Article imposes the sanctions in case of the absence of the passenger ticket, or if the passenger ticket does not contain all the particulars indicated, thus the sanction is too severe if it operates upon a simple omission, or on the carelessness of an airline employee—the commission came to an agreement on this point of view and in the last paragraph it took out the words:*
>
> *'or if the ticket does not contain the particulars indicated above.'*
>
> • • • • •

> *"M. Giannini (Italy)—I would like to have the Reporter give us the Article as it is now worded.*
>
> *"M. deVos, Reporter. It is the same text as that in the draft, there is only the omission in letter c) of the agreed stopping places and the addition of the British amendment after editing; and in the last paragraph the omission of 'or if the ticket does not contain the particulars indicated above.'" Warsaw Minutes,* ICAO Doc. 7838 pp. 100-101. (Underscoring added).

After final editing, Article 3 was adopted by the Conference without any language imposing the sanction in Article 3(2) on the carrier for the failure of the passenger ticket to include the particulars listed in Article 3(1). *Warsaw Minutes,* ICAO Doc. 7838 p. 129.

Reporting on the action of the Preparatory Commission with respect to the preliminary draft of Article 4, M. deVos stated:

> *"The last paragraph has not been altered like Article 3; that is to say that we have kept the same sanctions in case of errors in the particulars, now it is only a question, as compulsory particulars, of letters d) f) h)." Warsaw Minutes,* ICAO Doc. 7838 p. 104. (Underscoring added).

Regarding Article 8 and the contents of the air waybill, M. deVos reported:

> *"In the last sentence of the article we have limited the number of compulsory particulars, the other particulars becoming optional." Warsaw Minutes,* ICAO Doc. 7838 p. 106.

Thus none of the particulars listed in Article 3(1) was made compulsory in the passenger ticket, and only certain

specified particulars in Articles 4(3) and 8 were made compulsory in the baggage check and air waybill, the others being merely optional. Those particulars which the parties intended to be compulsory in the transportation documents were specified in the sanction clauses. The sanction in Article 4(4) specifies three compulsory particulars for inclusion in the baggage check, and the sanction in Article 9 specifies ten for inclusion in the air waybill. The sanction in Article 3(2) specifies none for the passenger ticket.

The history of the drafting of the Convention, as summarized above, demonstrates the clear intent of the parties that the sanction in Article 3(2) apply only to cases of non-delivery of the passenger ticket, and that this sanction not apply for the failure of the passenger ticket to include any of the particulars listed in Article 3(1). By applying the sanction in Article 3(2) to a situation where the delivered passenger ticket in effect omits the statement in Article 3(1)(e), the Court below, by judicial decision, has written back into the Treaty a provision which the contracting parties had expressly considered in a preliminary draft and flatly rejected before final adoption.

III

The decision of the Court below is based on the erroneous premise that the provisions of the Warsaw Convention excluding or limiting the carrier's liability apply only where the passenger is given notice that in the event of a crash the amount of recovery is limited very substantially.

Application of the provisions of the Warsaw Convention which exclude or limit the carrier's liability does not depend upon any concept of notice. The Convention, by its own terms, applies automatically whenever the transportation involved is "international transportation" within the meaning of Article 1(2). *Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804 (2d Cir. 1966); *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956); *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. 2d 880 (1949).

The fundamental error of the Court below was in viewing the Convention as a plan whereby the carrier can limit its liability, provided notice is given to the passenger that in the event of a crash the "amount of recovery . . . is limited very substantially." 370 F.2d at 513 (A. 96a). The Court reasons that this notice is required so that the passenger will have an opportunity to take "self-protective measures," such as the purchase of additional flight insurance. 370 F.2d at 513 (A. 96a).

The concept of "self-protective measures" is inconsistent with the conditions which existed in 1929 in the air transport industry relating to the carrier's liability, for it presupposes that the Convention deprived the passenger of an existing right to unlimited recovery. At the time of the

adoption of the Convention, however, the liability of the carrier to passengers or shippers was determined in most countries solely upon the basis of the terms of the contract of transportation. As a result, the carrier was not responsible in the event of the injury or death of its passengers, or the loss of baggage or cargo, because of exoneration clauses in the contracts. In France and England, for example, the pre-Convention system of liability applicable in air transportation cases was more favorable to the carrier than that established by the Convention.[3]

The delegates to the Warsaw Conference were determined to replace this contractual system of liability with a Convention establishing a system of uniform rules governing a carrier's liability. The proposed rules were designed to establish rights of recovery in favor of passengers and shippers, restrict the circumstances under which the carrier could be exonerated, but limit the carrier's liability. As was stated by the delegate for France, M. Ripert, with regard to the preliminary draft of the Convention:

> "*[T]his Agreement creates an exceptional system against the carrier, for in most countries of the world, the transportation contract is concluded under a free system. The carrier is free to insert in the contract clauses which exclude or reduce his responsibility, for cargo as well as passengers. You can well believe that they have not failed to do this and many airline companies are currently operating under this free contractual system, and in practice, and in actual fact, they are not responsible. One has wanted to impose on them a compulsory law of liability. . . . [The Agreement] is then a compulsory law, for all the carriers,*

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[3] *Warsaw Minutes*, ICAO Doc. 7838 p. 68. For a general discussion of the pre-Convention system of liability in the air transport industry, see *Warsaw Minutes*, ICAO Doc. 7838 pp. 26-37.

a law of responsibility which has been imposed on them." Warsaw Minutes, ICAO Doc. 7838 pp. 32-33.

The Convention, then, was a compromise between differing systems of liability, and the prevailing system of contractual liability was replaced by a system of uniform rules of liability based on the idea of fault and limited liability. *Warsaw Minutes,* ICAO Doc. 7838 p. 92. Contrary to the statement of the Court below, 370 F. 2d at 513, the true *"quid pro quo"* in the Convention for the establishment of the right of recovery in the passenger, without requiring proof of fault, is the limitation of the carrier's liability.

As was stated by the Secretary of State in transmitting the Convention to the President for approval:

> *"It will be observed that while under the terms of the Convention passengers and shippers acquire certain definite rights in international air transportation, the airline carriers obtain the benefit of a limitation of liability."* S. Doc. Exec. G., 73d. Cong. 2d Sess. 4 (1934).

See generally, Drion, Limitation of Liabilities in International Air Law ¶¶30-31 (1955).

The conditions and circumstances leading to the adoption of the Warsaw Convention may no longer exist. As stated by Judge Moore in his dissenting opinion:

> *"The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts."* 370 F. 2d at 515 (A. 100a).

Changed conditions and circumstances cannot affect the rights of the parties to the case at bar because the Con-

vention, as adopted in 1929, is still in effect as to the United States.

It is in the light of the conditions and circumstances which existed at the time the Treaty was adopted that the Convention must be read, with a view to effecting the objects and purposes of the contracting parties. *Nielsen* v. *Johnson*, 279 U. S. 47, 57-58 (1929).

Courts are not at liberty to interpret a Treaty in the light of changing conditions. So long as the Treaty remains in force, in its unamended state, courts are bound to give effect to the intent of the parties as expressed in the plain language of the Treaty.

In the case at bar, the reasoning and the decision of the Court below are in conflict with the plain language of the Treaty and the purposes sought to be achieved by the parties when the Convention was adopted in 1929. To support its decision, the Court does not refer to any provision of the Treaty, but rather relies upon the rationale of inapplicable decisions in *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), and *Warren* v. *The Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).[4] Petitioner does not dispute the correctness of the abstract principle of law established by the *Mertens* and *Warren* cases that the Treaty provides for absolute unlimited liability for non-delivery of the passenger ticket within the meaning of

[4] Both of these cases dealt with the timeliness of the ticket delivery, and whether the carrier had accepted the passenger without a passenger ticket having been delivered within the meaning of Article 3(2). In *Mertens*, the aircraft was almost ready to taxi for takeoff when the ticket was delivered to the passenger on board the aircraft. In *Warren*, the passengers were handed the tickets at the foot of the stairs leading into the aircraft as they were boarding the aircraft for the flight. In either case no question was raised or decided concerning the conformity of the contents of the passenger tickets with Treaty requirements.

Article 3(2) of the Convention. The plain language of the sanction in Article 3(2) supports this conclusion.

Petitioner does challenge as error, however, the use by the Court below of the underlying rationale of the *Mertens* and *Warren* decisions as a basis for interpreting Article 3(2) to require delivery of a ticket which notifies the passenger that the Treaty limits the carrier's liability in the event of a crash. Such an interpretation amounts to nothing more than an extension, by judicial decision, of the sanction in Article 3(2) to cases where the delivered passenger ticket fails to contain the statement in Article 3(1)(e), contrary to the intent of the parties to the Convention, expressed both in the plain language of the Treaty and its drafting history. See Points I and II, *supra*, pp. 8-24.

The Court below rejected the language of the Convention, stating that it was merely relevant to its decision. 370 F.2d at 511 (A. 94a). The plain language of a treaty has always been regarded by this Court as determinative of the intent of the parties, and not merely relevant to that intent. The Court below totally disregards the drafting history of the Convention which confirms the intent of the parties expressed in the language of the Treaty. Neither the language of the Convention, nor its drafting history, permits any interpretation of Article 3(2) other than that urged by petitioner, namely, that the sanction in Article 3(2) does not apply for the failure of the passenger ticket to contain, in effect, the statement in Article 3(1)(e).

IV

The passenger tickets and baggage checks delivered by Alitalia contain a statement that the transportation is subject to the liability rules of the Convention.

For many years, it has been the uniform practice in the air transport industry to incorporate the passenger ticket and the baggage check into one document. Consistent with this practice, the passenger tickets delivered by Alitalia in this case are also the baggage checks, and are so designated (A. 21a-57a).

On the cover of this dual-purpose ticket, each passenger is cautioned to examine the ticket carefully, particularly the conditions appearing on page 4. The conditions on page 4 provide in substance that the transportation is subject to the rules and limitations relating to liability established by the Warsaw Convention.[5]

In addition, each flight coupon and passenger coupon in the ticket explicitly states that the Warsaw Convention may be applicable and that "the Convention governs and in most cases limits" the carrier's liability for death or personal injury and loss of or damage to baggage.[6] Each

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[5] Condition 2(a) states:

"2(a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called 'the Convention'), unless such carriage is not 'international carriage' as defined by the Convention." (A. 23a, 53a, 57a).

[6] The following statement appears directly under the passenger's name on each coupon:

"If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." (A. 25a-37a, 41a-51a).

coupon also contains a statement that the ticket and baggage check are issued "Subject to the Conditions of Contract on page 4" (A. 21a-57a).

Upon examination of the passenger tickets and baggage checks delivered by Alitalia, the Court below held that, because of the size of type used and their location on the tickets, these statements did not satisfy what the Court construed to be the requirements of the Treaty. 370 F. 2d at 513-514. The Convention itself, however, is silent on the location of the statements and the size of type to be used. Nor did the Hague Protocol of 1955 amending the Warsaw Convention require that the statement be printed in a specified type size or in contrasting color, as proposed by the United States. I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 124.

The Court below also took the position that the statement in the passenger ticket and baggage check must notify the passenger that the Treaty limits the carrier's liability in the event of a crash. 370 F. 2d at 513. The Convention, however, does not require this. Strict adherence to the provisions of Article 3(1)(e), relating to the statement in the passenger ticket,[7] and Article 4(3)(h), relating to the statement in the baggage check, would merely require:

> *"A statement that the transportation is subject to the rules relating to liability established by this Convention."* 49 Stat. 3014, 3015.

Significantly, it was only as a result of the amendments to Articles 3 and 4 adopted at the Hague Conference in 1955 that any reference to the Treaty limits of liability was required in the passenger ticket and baggage check. II IN-

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[7] Petitioner maintains that Article 3 does not make the inclusion of this statement in the passenger tickets compulsory in any event, as held by the Court below. See Point I, *supra*, page 8.

TERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 pp. 2-3.

Even though the Hague Protocol was not in effect at the time of the accident involved in this case, the passenger tickets and baggage checks delivered by Alitalia contained the language of the statement adopted at the Hague Conference. Alitalia's passenger tickets and baggage checks contained the Hague language because the International Air Transport Association (IATA), subsequent to the Hague Conference, had revised the standard passenger ticket and baggage check to include this new form of statement. In approving this revised form of passenger ticket, the Civil Aeronautics Board of the United States, specifically with regard to the language of this statement, said:

> *"The new form is much clearer and informative than the one now found on the ticket."* [8]

With regard to the location of the statement on the ticket, the Civil Aeronautics Board gave the carrier the option of inserting it either on the outside front cover or on each passenger coupon of the ticket. 24 C.A.B. 575 at 577-8. In actual practice, however, the statement is inserted both on each flight coupon and on the passenger coupon, directly under the name of the passenger.

Every reported case we have found which has considered the adequacy of these statements as they appear on the standard airline passenger tickets, baggage checks, and air waybills, has held that the statements satisfy the requirements of the Treaty. *Seth* v. *British Overseas Airways Corporation,* 329 F. 2d 302 (1st Cir. 1964), *cert. denied,* 379 U. S. 858 (1964); *Eck* v. *United Arab Airlines, Inc.,* 20 A. D. 2d 454, 457 (1st Dep't. 1964), *rev'd on other grounds,* 15 N. Y.

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[8] *Pan American World Airways, Inc., et al., Conditions of Carriage and Related Traffic Regulations,* 24 C.A.B. 575, 577 (1957).

2d 53 (1964); *Manufacturers Hanover Trust Co.* v. *American Airlines, Inc.*, 23 A. D. 2d 832 (1st Dep't. 1965); *Samuel Montague & Co.* v. *Swiss Air Transport Co.* [1966], 1 Lloyd's List. L.R. 323. See also, *Ross* v. *Pan American Airways, Inc.*, 299 N.Y. 88, 95, 85 N.E. 2d 880, 884 (1949); *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). Against this wall of uniform authority, the decision of the Court below stands alone.

In conclusion, it is submitted, the passenger tickets and baggage checks delivered by Alitalia contain all of the particulars listed in Articles 3(1) and 4(3), including a statement as to the applicability of the liability rules of the Convention, and comply fully with the Warsaw Convention.

V

In any event the question of the readability of the passenger ticket and baggage check should be decided by a jury.

The Court below has held, as a matter of law, that the standard airline passenger ticket and baggage check in daily use throughout the world is unreadable. In so holding, the Court below has deprived petitioner of a jury trial on this issue. Petitioner submits that the question of print readability should be decided by a jury. U.S. Const. amend. VII.

As stated by Judge Moore in his dissenting opinion:

> *"Furthermore, for the courts to say that a jury could not reasonably have found that the ticket gave the passenger the required notice is, upon a motion for partial summary judgment, to usurp the time-honored function of the jury."* 370 F. 2d at 515 (A. 102a).

CONCLUSION

The judgments of the Court below should be reversed, and the cause remanded with instructions to deny plaintiffs' motion for partial summary judgment.

Respectfully submitted,

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

THOMAS J. WHALEN
of Counsel

December 21, 1967

Certificate of Service

I hereby certify that I have this 21st day of December, 1967, served the foregoing Brief for Petitioner upon respondents, the International Air Transport Association, the Air Transport Association of America, the United States, the United Kingdom of Great Britain and Northern Ireland, the Republic of Italy, and Arnold Holtzman, *amici curiae,* by depositing same in the United States mailbox at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid addressed to the respective attorneys of record as follows:

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10015

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

EDWIN LONGCOPE
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

ALFRED C. CLAPP
Counsel for the Republic of Italy
744 Broad Street
Newark, New Jersey

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

APPENDIX

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. 49 Stat. 3000, et seq.; T. S. 876

CHAPITRE PREMIER.

OBJET—DEFINITIONS.

Article Premier.

(1) La présente Convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transports aériens.

(2) Est qualifié "transport international", au sens de la présente Convention, tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes, soit sur le territoire d'une seule

CHAPTER I.

SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two

Haute Partie Contractante, si une escale est prévue dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une autre Puissance même non Contractante. Le transport sans une telle escale entre les territoires soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité de la même Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention.

(3) Le transport à exécuter par plusieurs transporteurs par air successifs est censé constituer pour l'application de cette Convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats et il ne perd pas son

High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not

caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une même Haute Partie Contractante. 49 Stat. 3001.

lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party. 49 Stat. 3014-15.

Chapitre II.
Titres de Transport.

Section I.—Billet de passage.

Article 3.

(1) Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse

Chapter II. Transportation Documents

Section I—Passenger ticket

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the

faire perdre au transport son caractère international;

alteration shall not have the effect of depriving the transportation of its international character;

d) le nom et l'adresse du ou des transporteurs;

(*d*) The name and address of the carrier or carriers;

e) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence, ni la validité du contrat de transport, qui n'en sera pas moins soumis au règles de la présente Convention. Toutefois si le transporteur accepte le voyageur sans qu'il ait été délivré un billet de passage, il n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité. 49 Stat. 3001.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability. 49 Stat. 3015.

SECTION II.—
BULLETIN DE BAGAGES.

Article 4.

(1) Dans le transport de bagages, autres que les menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.

(2) Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur.

(3) Il doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) le nom et l'adresse du ou des transporteurs;

d) le numéro du billet de passage;

e) l'indication que la livraison des bagages est faite au porteur du bulletin;

SECTION II.—BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be

f) le nombre et le poids des colis;

g) le montant de la valeur déclarée conformément à l'article 22 alinéa 2;

h) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(4) L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence, ni la validité du contrat de transport, que n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres d), f), h), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité. 49 Stat. 3002.

made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22 (2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability. 49 Stat. 3015-16.

SECTION III.—LETTRE DE TRANSPORT AERIEN.

* * * * *

Article 8.

La lettre de transport aérien doit contenir les mentions suivantes:

a) le lieu où le document a été créé et la date à laquelle il a été établi;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) le nom et l'adresse de l'expéditeur;

e) le nom et l'adresse du premier transporteur;

f) le nom et l'adresse du destinataire, s'il y a lieu;

g) la nature de la marchandise;

SECTION III.—AIR WAYBILL

* * * * *

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

h) le nombre, le mode d'emballage, les marques particulières ou les numéros des colis;

i) le poids, la quantité, le volume ou les dimensions de la marchandise;

j) l'état apparent de la marchandise et de l'emballage;

k) le prix du transport s'il est stipulé, la date et le lieu de paiement et la personne qui doit payer;

l) si l'envoi est fait contre remboursement, le prix des marchandises et, éventuellement, le montant des frais;

m) le montant de la valeur déclarée conformément à l'article 22, alinéa 2;

n) le nombre d'exemplaires de la lettre de transport aérien;

o) les documents transmis au transporteur pour accompagner la lettre de transport aérien;

p) le délai de transport et indication sommaire de la

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22 (2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

voie à suivre (*via*) s'ils ont été stipulés;

q) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention. 49 Stat. 3003.

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention. 49 Stat. 3016-17.

Article 9.

Si le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport aérien, ou si celle-ci ne contient pas toutes les mentions indiquées par l'article 8 [a) à i) inclusivement et q)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité. 49 Stat. 3003.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability. 49 Stat. 3017.

CHAPITRE III. RESPONSABILITE DU TRANSPORTEUR.

Article 17.

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement. 49 Stat. 3005.

Article 18.

(1) Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés ou de marchandises lorsque l'événement qui a causé le dommage s'est produit pendant le transport aérien.

(2) Le transport aérien, au sens de l'alinéa précédent, comprend la période pendant laquelle les bagages ou

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period

marchandises se trouvent sous la garde du transporteur, que ce soit dans un aérodrome ou à bord d'un aéronef ou dans un lieu quelconque en cas d'atterrissage en dehors d'un aérodrome.

(3) La période du transport aérien ne couvre aucun transport terrestre, maritime ou fluvial effectué en dehors d'un aérodrome. Toutefois lorsqu'un tel transport est effectué dans l'exécution du contrat de transport aérien en vue du chargement, de la livraison ou du transbordement, tout dommage est présumé, sauf preuve contraire, résulter d'un événement survenu pendant le transport aérien. 49 Stat. 3005.

during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air. 49 Stat. 3019.

Article 19.

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de voyageurs, bagages ou marchandises. 49 Stat. 3005.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods. 49 Stat. 3019.

Appendix

Article 20.

(1) Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre.

(2) Dans les transports de marchandises et de bagages, le transporteur n'est pas resonsable, s'il prouve que le dommage provient d'une faute de pilotage, de conduite de l'aéronef ou de navigation, et que, à tous autres égards, lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage. 49 Stat. 3005.

Article 21.

(1) Dans le cas où le transporteur fait la preuve que la faute de la personne lésée a causé le dommage ou y a contribué, le tribunal pourra, conformément aux dispositions de sa propre loi, écarter ou atténuer la responsabilité du transporteur. 49 Stat. 3006.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. 49 Stat. 3019.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability. 49 Stat. 3019.

Appendix

Article 22.

(1) Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs. Dans le cas où, d'apres la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée.

(2) Dans le transport de bagages enregistrés et de marchandises, la responsabilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans ce cas, le

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be lia-

transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

ble to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) En ce qui concerne les objets dont le voyageur conserve la garde, la responsabilité du transporteur est limitée à cinq mille francs par voyageur.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) Les sommes indiquées ci-dessus sont considérées comme se rapportant au francs français constitué par soixante-cinq et demie milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds. 49 Stat. 3006.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures. 49 Stat. 3019.

Article 23.

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be

Convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente Convention. 49 Stat. 3006.

null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention. 49 Stat. 3020.

Article 24.

(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs. 49 Stat. 3006.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights. 49 Stat. 3020.

Article 25.

(1) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui exclu-

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or

ent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol.

limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Ce droit lui sera également refusé si le dommage a été causé dans les mêmes conditions par un de ses préposés agissant dans l'exercise de ses fonctions. 49 Stat. 3006.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment. 49 Stat. 3020.

Article 26.

(1) La réception des bagages et marchandises sans protestation par le destinataire constituera présomption, sauf preuve contraire, que les marchandises ont été livrées en bon état et conformément au titre de transport.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) En cas d'avarie le destinataire doit adresser au

(2) In case of damage, the person entitled to delivery

transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de trois jours pour les bagages et de sept jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra être faite au plus tard dans les quatorze jours à dater du jour où le bagage ou la marchandise auront éte mis à sa disposition.

(3) Toute protestation doit être faite par réserve inscrite sur le titre de transport ou par un autre écrit expédié dans le délai prévu pour cette protestation.

(4) A défaut de protestation dans les délais prévus, toutes actions contre le transporteur sont irrecevables, sauf le cas de fraude de celui-ci. 49 Stat. 3006-7.

Article 27.

En cas de décès du débiteur, l'action en responsabilité, dans les limites prèvues

must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part. 49 Stat. 3020.

Article 27

In the case of the death of the person liable, an action for damages lies in ac-

par la présente Convention, s'exerce contre ses ayants droit. 49 Stat. 3007.

cordance with the terms of this convention against those legally representing his estate. 49 Stat. 3020.

Article 28.

(1) L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'une des Hautes Parties Contractantes, soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) La procédure sera réglée par la loi du tribunal saisi. 49 Stat. 3007.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted. 49 Stat. 3020-1.

Article 29.

(1) L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans à compter

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the

de l'arrivée à destination ou du jour où l'aéronef aurait dû arriver, ou de l'arrêt du transport.

(2) Le mode du calcul du délai est déterminé par la loi du tribunal saisi. 49 Stat. 3007.

Article 30.

(1) Dans les cas de transport régis par la définition du troisième alinéa de l'article premier, à exécuter par divers transporteur successifs, chaque transporteur acceptant des voyageurs, des bagages ou des marchandises est soumis aux règles établies par cette Convention, et est censé être une des parties contractantes du contrat de transport, pour autant que ce contrat ait trait à la partie du transport effectuée sous son contrôle.

date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted. 49 Stat. 3021.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) Au cas d'un tel transport, le voyageur ou ses ayants droit ne pourront recourir que contre le transporteur ayant effectué le transport au cours duquel l'accident ou le retard s'est produit, sauf dans le cas où, par stipulation expresse, le premier transporteur aura assuré la responsabilité pour tout le voyage.

(3) S'il s'agit de bagages ou de marchandises, l'expéditeur aura recours contre le premier transporteur et le destinataire qui a le droit à la délivrance contre le dernier, et l'un et l'autre pourront, en outre, agir contre le transporteur ayant effectué le transport au cours duquel la destruction, la perte, l'avarie ou le retard se sont produits. Ces transporteurs seront solidairement responsables envers l'expéditeur et le destinataire. 49 Stat. 3007.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee. 49 Stat. 3021.

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No. 70

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Supreme Court of the United States

OCTOBER TERM, 1967

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Petitioner,

v.

JOHN LISI, ET AL., *Respondents.*

JOINT BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AND THE INTERNATIONAL AIR TRANSPORT ASSOCIATION AS AMICI CURIAE

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
1000 Connecticut Ave., N. W.
Washington, D. C. 20036
Attorneys for the Air Transport Association of America

HAROLD L. WARNER, JR.
25 Broadway
New York, N. Y. 10004
Attorney for the International Air Transport Association

J. G. THOMKA GAZDIK
EDWIN O. BAILEY
CARL S. ROWE
PAUL G. PENNOYER, JR.
Of Counsel.

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JOINT BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AND THE INTERNATIONAL AIR TRANSPORT ASSOCIATION AS AMICI CURIAE

The Air Transport Association of America ("ATA") and the International Air Transport Association ("IATA") respectfully submit this joint brief as *amici curiae* in support of the petitioner in this matter.

In accordance with the provisions of Rule 42.2 of the Court's Rules, written consent to the filing of such a joint brief as *amici curiae* has been requested and

obtained from both the petitioner and the respondents herein. Copies of the letters granting this consent are being submitted to the Clerk of the Court concurrently herewith.

The Nature of ATA's and IATA's Interest

ATA is a voluntary trade and service organization whose membership comprises virtually all of the scheduled, federally-certificated airlines of the United States. The names of the airline members of ATA are set forth in Appendix A to this brief. IATA is a body politic incorporated in 1945 by special Act of Parliament of Canada, 9-10 George VI, as an organization of the world's scheduled airlines. IATA has a membership of one hundred airlines from over sixty nations of the world. The names of the IATA member airlines are set forth in Appendix B.

The airline members of both associations have a substantial interest in the matters at issue in this case. All of the members of ATA and IATA participate in the carriage of international air traffic—over their own international routes, through interline arrangements with other carriers, or a combination of both.

As a result of collective arrangements by the world's airlines, a passenger dealing with one carrier can now move by air on a single ticket between almost any pair of points anywhere in the world. As the Chairman of the Civil Aeronautics Board has observed:

> "Today, a carrier's ticket stock is freely accepted around the world; baggage allowances are the same in Bangkok as they are in France or Greece; the carriers have a clearing house through which settlement of interline accounts exceeded 2.8 billion dollars last year . . . .

> "This uniformity is of immense value to the seasoned, as well as the unseasoned, traveler. He can now move between many lands with an ease and smoothness which is truly marvelous."[1]

The key to the airlines' achievement in thus serving the convenience of the traveling public is a comprehensive system of uniform standards, practices and procedures. At the heart of this system is the standardized airline passenger ticket under consideration in this case. The form of this ticket has been approved by the Civil Aeronautics Board, the appropriate regulatory agency of the United States Government, pursuant to its powers under Section 412 of the Federal Aviation Act of 1958, 72 Stat. 770, 48 U.S.C. § 1382. *Pan American World Airways, et al. Conditions of Carriage,* 24 C.A.B. 575 (1957).

In reliance upon the governmental approval and the worldwide acceptance of the standard form of passenger ticket under consideration herein, the ATA and IATA member airlines issue such tickets for the online and interline carriage of passengers over their respective routes, as well as honor these tickets when issued by other carriers. This standard ticket has thus become an accepted international document and over ninety per cent of all scheduled international air traffic moves thereunder.

This standard form of ticket is being honored and used by the world's airlines on the premise that trans-

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[1] Remarks of Chairman Charles S. Murphy before the World Congress, International Federation of Travel Agents, Athens, Greece, November 14, 1966, p. 7. For a comparative analysis of the difficulties encountered by reason of the necessity for ship passengers to deal separately with each steamship company, see Apter, *Shiplines Need A World Organization,* Travel Agent, April 10, 1964.

portation furnished thereunder which is international under the terms of the Warsaw Convention will be governed by this international treaty. Thus, the construction to be afforded the Warsaw Convention in this case is a matter of prime concern to ATA, IATA and their respective member airlines.

The Proceedings Below

Shortly after takeoff from Shannon, Ireland, while en route from Rome to New York on February 26, 1960, one of Alitalia's aircraft crashed. Each of the passengers aboard was traveling pursuant to a passenger ticket conforming to the requirements of the Warsaw Convention.[2] Most of the tickets had been purchased outside the United States.

Under ordinary circumstances Alitalia's liability in these actions for wrongful death and personal injuries would be limited by Article 22 of the Convention to the sum of 125,000 francs [$8,291.87] for each passenger.[3]

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[2] Article 3 of the Warsaw Convention (49 Stat. 3015; T.S. 876), adhered to by the United States effective October 29, 1934, provides that the passenger ticket shall contain (a) the place and date of issue; (b) the place of departure and destination; (c) the agreed stopping places; (d) the name and address of the carrier or carriers and (e) "a statement that the transportation is subject to the rules relating to liability established by this convention."

[3] 49 Stat. 3019. By reason of the extraordinary efforts of Mr. Knut Hammarskjold, Director General of IATA, an agreement constituting a special contract under Article 22(1) of the Convention has since been effected between 97 international airlines under which, as approved by the Civil Aeronautics Board effective May 16, 1966, liability on flights serving the United States is increased to proven damages not to exceed $75,000, inclusive of legal fees and costs, and liability up to this limit does not depend on negligence on the part of the carrier. 31 F.R. 7302 (1966). For an account of IATA's part in effecting this agreement see Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 586-596 (1967).

The District Court, although according to one authority "realizing that [it] was breaking a chain of hundreds of precedents,"[4] held that the statements in the tickets referring to the Convention were in type so small as to be "virtually invisible" and that petitioner had therefore failed to comply with Article 3(1)(e) of the Convention. *Lisi* v. *Alitalia-Linee Aeree Italiane,* 253 F. Supp. 237, 243 (S.D.N.Y. 1966). Accordingly, the District Court dismissed Alitalia's affirmative defense that its liability was limited under Article 22 of the Convention.

The Court of Appeals affirmed, Moore, J. dissenting. *Lisi* v. *Alitalia-Linee Aeree Italiane,* 370 F. 2d 508 (2d Cir. 1966). Ostensibly the majority ruled that "a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice." Id. at 514. In actuality the majority simply did not approve the terms of the Convention, labeling them as "arbitrary limitations on liability—which have been severely and repeatedly criticized. . . ." Id. at 512.

Clearly, as the dissent states, "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it." Id. at 515.

Summary of Argument

Although the Warsaw Convention provides that the passenger ticket shall contain "A statement that the transportation is subject to the rules relating to liability established by this convention", the omission of such statement does not affect the existence or validity of the contract of transportation. While *notice* thus need

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[4] Lowenfeld and Mendelsohn, *supra,* 80 Harv. L. Rev. at 512, n. 64.

not be given to passengers of the rules relating to liability established by the Convention, Alitalia's ticket contained such a statement and called particular attention to it on the cover of the ticket.

It was not until the Warsaw Convention was amended by the Hague Protocol, effective August 1, 1963, that *notice* to passengers was first required. Although there was no need for Alitalia to give such notice in this case, such notice, both in English and Italian, was contained in Alitalia's passenger ticket prominently positioned at the bottom of each passenger flight coupon.

The form of passenger ticket used by Alitalia was specifically approved by the Civil Aeronautics Board. And Alitalia's tariff on file with the Civil Aeronautics Board contained a provision advising as to rules relating to liability established by the Warsaw Convention. Thus Alitalia fully complied with all requirements of the Warsaw Convention and the Civil Aeronautics Board in this case.

ARGUMENT

I.

The Warsaw Convention of 1929 Does Not Require the Airline Ticket to Contain Notice to the Passenger of the Provisions of the Convention Which Exclude or Limit Liability.

The district court's dismissal of Alitalia's affirmative defense that its liability was limited under Article 22 of the Convention was premised on the ground that "compliance with the Convention requires . . . delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable."[5] In affirming, the Court of

[5] 253 F.Supp. at 239.

Appeals agreed "that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice."[6]

The difficulty with the decisions below is that both courts have proceeded to rewrite the Warsaw Convention of 1929. It is plain that there is no requirement in the Warsaw Convention which makes the partial defense of limited liability under Article 22 of the Convention unavailable if the passenger ticket does not contain a statement that "transportation is subject to the rules relating to liability established by this Convention."

While Articles 4 and 9 of the Warsaw Convention impose such a sanction[7] on the carrier for failure to include in the baggage check or air waybill a statement that the transportation is subject to the rules relating to liability established by the Convention, no such sanction is imposed with respect to the passenger ticket under Article 3.

Article 3 of the Warsaw Convention is explicit. "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention." It is only where the carrier "accepts a passenger without a passenger ticket having been delivered" that the carrier "shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

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[6] 370 F.2d at 514.

[7] The carrier "shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

In his Memorandum for the United States as Amicus Curiae, filed herein in June, 1967, the Solicitor General stated, at page 7, "To be sure, support for petitioner's position can be derived from a literal reading of the Convention."

Since the words of the Convention are plain, resort to its "legislative history" should be unnecessary. *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 178-180 (1967).

Had the courts below referred to this legislative history [8] they would have found that the omission from Article 3 of any sanction, save for failure to deliver a ticket, was deliberate and fully considered.

In May, 1928, C.I.T.E.J.A.[9] had proposed that Article 3(2) of the Warsaw Convention contain a sanction which would prohibit a carrier from availing itself of the limitations of liability if the passenger ticket omitted the statement that transportation is subject to the rules relating to liability established by the Convention.[10] The proposal of C.I.T.E.J.A. was rejected at the Warsaw Conference. Article 3(2) as finally adopted imposes no sanction upon the carrier in the event the ticket fails to contain the particulars listed in Article 3(1).

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[8] In *Mertens* v. *Flying Tiger Line*, 341 F.2d 851, 853-854 (2 Cir., 1965), certiorari denied 382 U.S. 816 (1965), the court found the negotiations surrounding the adoption of the Hague Protocol to the Warsaw Convention determinative of the question there in issue, i.e., whether military charter flights are covered by the Convention.

[9] Comité International Technique d'Experts Juridiques Aériens.

[10] IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc.: 7838, pp. 167-168. The French text of this document is set forth in Appendix C.

"Both the wording of Article 3(2), when compared with that of Articles 4(4) and 9, and the history of the provision make it abundantly clear that the framers of the Convention meant to impose the sanction with respect to the ticket only in case of a complete failure to deliver a ticket, and did not want to attach the sanction to the omission of the prescribed particulars." Drion, *Limitation of Liabilities in International Air Law* (1954) ¶ 251. See also, Geodhuis, *National Air-legislations and the Warsaw Convention* (1937), pp. 156-157; Shawcross and Beaumont, *Air Law*, ¶ 406 (2d Ed. 1951).

The courts below have rewritten the Warsaw Convention to add a sanction not contained in the Convention itself and one specifically rejected by the drafters of the Convention. If a treaty is to be rewritten, the revision should be by the sovereign governments involved and not by the courts of a single country. This is exactly the procedure that now has been followed here. The Warsaw Convention has been rewritten by the Hague Protocol to add by treaty amendment the very sanction which the courts below would enact judicially. The fact that the Hague Protocol has not yet been ratified by the United States and therefore is not applicable to transportation to and from the United States, and, for that matter, was not in effect anywhere at the time of the accident, merely emphasizes that this procedure is the only proper one to follow and that the Warsaw Convention cannot be amended by the decision of the courts of one of the more than 70 nations now parties to the Warsaw Convention.

As stated by this Court in *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 7 (1821):

> "We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to

take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality."

And as most recently stated by this Court in *Maximov* v. *United States*, 373 U.S. 49, 54 (1963):

"... it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."

II.

Even the Hague Protocol, While Not Here Applicable, Would Impose No Sanction in This Case.

While the Hague Protocol does not apply in the present case,[11] the courts below have attempted to decide this case as though the Hague Protocol applies, holding that the "Convention requires . . . a ticket . . . which notif[ies] the passenger that the provisions of the Convention which exclude or limit liability

[11] The Hague Protocol did not become effective until August 1, 1963, more than 3 years after the accident in this case. Furthermore, the Protocol has not yet been ratified by the United States. *Aeronautical Statutes and Related Material*, Revised May 1, 1967, Civil Aeronautics Board, p. 282.

are applicable." 253 F. Supp. at 239. The Hague Protocol, but not the Warsaw Convention, does contain such a requirement. Even if the Hague Protocol were applicable, however, the courts below erred in construing Article 3 of the Convention as amended by the Hague Protocol.

It was not until the Hague Conference in 1955 that Article 3(2) of the Warsaw Convention was amended to provide that "If the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22." [12] The amendment so adopted, save for minor changes in drafting, was that proposed by the United States.[13]

The courts below would hold that Alitalia failed to give the required notice because the notice was " 'ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else.' " [14]

Yet the tickets in this case admittedly contain the notice prescribed by the Hague Protocol. This "much clearer" [15] notice was not buried "in a thicket of 'Conditions of Contract'" or "ineffectively positioned." [16] On the contrary, this notice was prominently positioned at the bottom of *each* passenger flight coupon. Fur-

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[12] Appendix D sets forth a comparison of the provisions of Articles 3, 4 and 22 of the Warsaw Convention with the amendments to these provisions made by the Hague Protocol.

[13] Volume 2, Minutes, International Conference on Private Air Law, The Hague, September 1955, ICAO Doc. 7686-LC/140 p. 243.

[14] 370 F.2d at 514; citing 253 F.Supp. at 243.

[15] 24 C.A.B. 575, 577.

[16] 253 F.Supp. at 243.

thermore, this notice was set forth *twice*, once in Italian and once in English.[17] And the cover of each ticket in two languages and in bold face type clearly emphasized that the passenger should "carefully examine this ticket."

But the courts below rewrite even the Hague Protocol when they would require that the notice be so emphasized.

Here again the legislative history of the Hague Protocol is clear. For years the standard form of IATA ticket had been printed in small type because of the number of provisions deemed requisite in the conditions of carriage by the applicability of the Convention in over 70 different countries. Aware of the form and size of type employed in the IATA ticket, the United States representative at the Hague Protocol specifically proposed that the notice be printed in contrasting color and that *the heading* of the notice regarding the applicability of the Convention "should be set out in letters of not less than five millimeters high."[18] The Conference, however, specifically rejected this proposal.[19]

The courts below would rewrite the Convention to make mandatory a larger type size of the statement specified in Article 3 of the Hague Protocol. Yet the

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[17] The tickets of many foreign carriers are printed solely in foreign language. In the case below, the Italian plaintiff attempted to argue that Alitalia's ticket, sold in Algiers, should have been printed in Arabic although admittedly the plaintiff could not read Arabic. 253 F. Supp. at 243 n. 7.

[18] Volume 1, Minutes, International Conference on Private Air Law, The Hague, September 1955, ICAO Doc. 7686-LC/140, p. 124.

[19] *Id.* at p. 124.

executive branch of the United States Government was unsuccessful in its attempt so to amend the Convention at the Hague Conference in September 1955. Instead, the parties to the Warsaw Convention endorsed continuation of the type size long employed in the standard form of IATA ticket.

It is no wonder that the decision below is viewed as "breaking a chain of hundreds of precedents."[20] There is no basis for this decision. Clearly, as the dissent in the Court of Appeals states, "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it." 370 F. 2d at 515.

III.

Alitalia's Ticket Conformed to the Warsaw Convention and to All Requirements of the Civil Aeronautics Board

Although, as shown in Point I, the Convention is applicable without regard to what provisions were on the ticket, Alitalia's ticket did contain in Condition 2 of its Conditions of Contract the statement specified in Article 3(1) of the Warsaw Convention of 1929 that "Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw, October 12, 1929." 253 F. Supp. at 241.

In addition, each flight coupon of Alitalia's ticket contained the notice specified in Article 3(1) of the Warsaw Convention as amended by the Hague Protocol of 1955 that "If the passenger's journey involves

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[20] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 512, n. 64.

an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." 253 F. Supp. at 242.

The form of IATA standard passenger ticket utilized by Alitalia in this case had been the subject of almost constant surveillance by the Civil Aeronautics Board since 1949 when the form of uniform passenger ticket and the conditions of contract to be printed thereon were first approved by the Civil Aeronautics Board. *IATA Traffic Conference Resolutions,* 10 C.A.B. 783 (1949).

On February 12, 1957 the Civil Aeronautics Board approved the standard form of IATA ticket stating:

> "The revision to the form of passenger ticket provides for changing the notice of applicability of the Convention which is required by the Convention in the form specified in the Protocol to the convention adopted at The Hague. The new form is much clearer and informative than the one now found on the ticket." 24 C.A.B. 575, 577.

This approval of the Civil Aeronautics Board was issued following a meeting with members of IATA on January 17, 1955 and "a large number of further meetings with the IATA members or their representatives . . . to develop a resolution on the conditions of contract to be placed in the ticket which would meet the objections raised by the Board in its order No. E-8543" of August 5, 1954. 24 C.A.B. at 576.

At no time during the Board's investigation of over two years did the Board require that the size of

type in the passenger ticket under consideration be changed.[21]

Indeed it was not until April 1, 1963 that the Board first suggested that "the type in which the notice is currently printed on the ticket is too small to alert the passengers to the importance of the matter." 28 F.R. 3281, 3282 (1963). And it was not until October 31, 1963, when the Board amended Part 221 of its Economic Regulations, effective February 1, 1964, that the Board first required that each air carrier and foreign air carrier availing itself of the limitation on liability to passengers provided by the Warsaw Convention utilize a special statement to be printed "in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) on the ticket envelope." 28 F.R. 11775, 11777 (1963).

Finally, pursuant to the reference in its tickets so approved by the Civil Aeronautics Board, Alitalia filed its tariff with the Civil Aeronautics Board setting forth the application of the Warsaw Convention to international transportation performed thereunder by Alitalia.[22] This tariff, which was required to be main-

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[21] It cannot be asserted that the CAB was unaware of the form and size of type used in the standard IATA passenger ticket. Appendix E contains a reprint from the CAB's files of the pertinent pages of the IATA agreements which were before the Board at the time, Agreement Nos. CAB 10559 and 7648. Included therein were exact reproductions of the actual form of ticket used (see Attachments "A" and "B" to Resolution 275, pages 297 and 298).

[22] Alitalia-Linee Aeree Italiane, International Local and Joint Passenger Rules Tariff No. PR-5, C.A.B. No. 6, Original Page 22, effective April 1, 1959, cancelled effective May 15, 1964 by 1st Revised Page 22.

tained at each of Alitalia's stations or offices where tickets for passenger transportation were sold,[23] constituted still further notice to the plaintiffs herein. In fact, the Warsaw Convention rules relating to liability and the tariff so filed became a part of the contract of carriage between Alitalia and its passengers.[24]

CONCLUSION

The dismissal below of the affirmative defenses based on the articles of the Warsaw Convention which limit an airline's liability to its passengers was erroneous and should be reversed.

Respectfully submitted,

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
1000 Connecticut Ave., N. W.
Washington, D. C. 20036
Attorneys for the Air Transport Association of America

HAROLD L. WARNER, JR.
25 Broadway
New York, N. Y. 10004
Attorney for the International Air Transport Association

J. G. THOMKA GAZDIK
EDWIN O. BAILEY
CARL S. ROWE
PAUL G. PENNOYER, JR.
Of Counsel.

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[23] § 221.171, Economic Regulations of the Civil Aeronautics Board, as amended by Regulation No. ER-278, effective August 8, 1959.

[24] *Boston and Maine Railroad* v. *Hooker*, 233 U.S. 97 (1914); *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913); *Vogelsang* v. *Delta Air Lines*, 302 F. 2d 709 (2d Cir., 1962), *cert. den.* 371 U.S. 826 (1962); *Lichten* v. *Eastern Airlines*, 189 F. 2d 939 (2d Cir., 1951).

Certificate of Service

I, Joseph F. Healy, Jr., an attorney for the Air Transport Association of America and a member of the bar of the Supreme Court of the United States, hereby certify that on the 21st day of December, 1967, I served the foregoing Joint Brief of the Air Transport Association of America and the International Air Transport Association as Amici Curiae upon each of the parties, by mailing copies thereof in properly addressed envelopes with first class postage prepaid, to their respective atorneys of record, as follows:

Austin P. Magner, Esquire
George N. Tompkins, Jr., Esquire
One Rockefeller Plaza
New York, N. Y. 10020
Counsel for Petitioner

Theodore E. Wolcott, Esquire
36 West 44th Street
New York, N. Y. 10036
Counsel for Respondents

The Solicitor General
Department of Justice
Washington, D. C. 20530

Edwin Longcope, Esquire
26 Broadway
New York, N. Y. 10004
Counsel for the United Kingdom of Great Britain and Northern Ireland

Alfred C. Clapp, Esquire
744 Broad Street
Newark, N. J.
Counsel for the Republic of Italy

Stuart M. Speiser, Esquire
200 Park Avenue
New York, N. Y. 10017
Counsel for Arnold Holtzman

APPENDIX A

Members of the Air Transport Association of America

*Air Canada
Alaska Airlines, Inc.
Alaska Coastal Airlines
Allegheny Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Bonanza Air Lines, Inc.
Braniff International
*Canadian Pacific Airlines Ltd.
Caribbean-Atlantic Airlines, Inc.
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
The Flying Tiger Line Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Lake Central Airlines, Inc.
Los Angeles Airways, Inc.
Mohawk Airlines, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northeast Airlines, Inc.
Northern Consolidated Airlines, Inc.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pacific Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines
Reeve Aleutian Airways, Inc.
Southern Airways, Inc.
Trans Caribbean Airways, Inc.
Trans-Texas Airways, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
West Coast Airlines, Inc.
Western Air Lines, Inc.
Wien Air Alaska

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* Associate Member.

APPENDIX B

Members of the International Air Transport Association
(As At 1st March 1967)

Active Members (86)

Aden Airways Ltd. (Fed. of South Arabia)
Aer Lingus Teoranta (Dublin)
Aerlinte Eireann (Dublin)
Aerolineas Argentinas (Buenos Aires)
Aerolineas Peruanas S. A. (Lima)
Aeronaves de Mexico S. A. (Mexico City)
Aerovias Nacionales de Colombia S.A. (AVIANCA)
(Bogotá)
Air Afrique (Abidjan)
Air Algérie (Algiers)
Air Canada (Montreal)
Air Ceylon (Colombo)
Air Congo (Kinshasa)
Air France (Paris)
Air Guinée (Conakry)
Air-India (Bombay)
Air Mali (Bamako)
Air New Zealand (Auckland)
Air Vietnam (Saigon)
ALIA—The Royal Jordanian Airlines (Amman)
ALITALIA-Linee Aeree Italiane (Rome)
American Airlines Inc. (New York)
Austrian Airlines (Vienna)
Aviacion y Comercio S.A. (Madrid)

Braniff International Airways (Dallas)
British Eagle International Airlines (London)
British European Airways (London)
British Overseas Airways Corp. (London)
British United Airways Ltd. (London)
British West Indian Airways (Trinidad)

Canadian Pacific Air Lines (Vancouver)
Central African Airways Corporation
(Salisbury, Southern Rhodesia)
Ceskoslovenske Aerolinie N.P. (Prague)
Civil Air Transport Co. Ltd. (Taipei)
Cyprus Airways Limited (Nicosia)

Delta Air Lines Inc. (Atlanta)
Deutsche Lufthansa (Cologne)
Direccao de Exploraçao dos Transportes Aereos "DETA"
(Lourenço Marques)
Direcçao de Exploracao dos Transportes Aereos "DTA"
(Luanda)

East African Airways Corp. (Nairobi)
Eastern Airlines Inc. (New York)
El Al Israel Airlines (Tel Aviv)
Empresa Consolidada Cubana Aviacion (Havana)
Empresa de Viacao Aerea Rio Grandense (VARIG)
(Porto Alegre)
Ethiopian Air Lines S. C. (Addis Ababa)

FINNAIR—Aero O/Y (Helsinki)
Flugfelag Islands H. F. (Reykjavik)

P. N. Garuda Indonesian Airways (Djakarta)
Ghana Airways Corporation (Accra)

IBERIA, Lineas Aereas de Espana (Madrid)
Indian Airlines Corporation (New Delhi)
Iran National Airlines Corp. (Teheran)
Iraqi Airways (Baghdad)

Japan Air Lines Co. Ltd. (Tokyo)
Jugoslovenski Aerotransport (JAT) (Belgrade)

Kingdom of Libya Airlines (Benghazi)
KLM Royal Dutch Airlines (The Hague)
Kuwait Airways Corporation (Kuwait)

Lebanese International Airways (Beirut)
Linea Aerea Nacional (LANCHILE) (Santiago)

The Malta Airlines (Sliema)
Middle East Airlines Airliban (Beirut)
Mohawk Airlines Inc. (Utica, N. Y.)

Northwest Airlines Inc. (St. Paul)

Olympic Airways S. A. (Athens)

Pakistan International Airlines Corp. (Karachi)
Pan American World Airways Inc. (New York)
Philippine Air Lines Inc. (Manila)
Polish Airlines "LOT" (Warsaw)

Qantas Empire Airways Ltd. (Sydney)

Scandinavian Airlines System (Stockholm)
Seaboard World Airlines Inc. (New York)
Servicos Aereos Cruzeiro do Sul S. A. (Rio de Janeiro)
Société Anonyme Belge d'Exploitation de la Navigation Aérienne (SABENA) (Brussels)
South African Airways (Johannesburg)
Sudan Airways (Khartoum)
Swiss Air Transport Co. Ltd. (Zurich)

Trans-Mediterranean Airways SAL (Beirut)
Transportes Aereos Portugueses (TAP) (Lisbon)
Trans World Airlines Inc. (New York)
Tunis Air (Tunis)
Turk Hava Yollari (Istanbul)

Union de Transports Aériens (UTA) (Paris)
United Air Lines (Chicago)
United Arab Airlines (Cairo)

Venezolana Internacional de Aviacion S. A. (VIASA) (Caracas)

WAAC (Nigeria) Limited (Lagos)

Associate Members (14)

Ansett-ANA (Melbourne)

Chicago Helicopter Airways Inc. (Chicago)
Commercial Air Services (Pty) Ltd. (Johannesburg)
Continental Air Lines Inc. (Los Angeles)

Eastern Provincial Airways (1963) Ltd. (Gander)

Flying Tiger Line Inc. (Burbank)

Linea Aerea del Cobre Ltda. (Santiago)

National Airlines Inc. (Miami)
New York Airways Inc. (New York)
New Zealand National Airways Corp. (Wellington)

Quebécair Inc. (Rimouski)

Suidwes Lugdiens (Eiendoms) Beperk (Windhoek, S.W. Africa)

Trans Australia Airlines (Melbourne)

Viacao Aerea Sao Paulo S. A. (VASP) (Sao Paulo)

APPENDIX C

[pp. 167-168]

AVANT-PROJET DE CONVENTION

relative aux documents de transport aérien et à la responsabilité du transporteur dans les transports internationaux par aéronefs.

adopté par le C. I. T. E. J. A. au cours de sa Troisième Session, Mai 1928

. . . . . .

Chapitre II.

Titre de transport.

Section I. — Billet de passage

Article 3

Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) l'indication sommaire de la voie à suivre (*via*) ainsi que les arrêts prévus;

d) le nom et l'adresse du ou des transporteurs.

Le billet de passage doit contenir, en outre, une clause stipulant que le transport est soumis au régime de la responsabilité établi par la présente Convention.

L'absence, l'irrégularité ou la perte de ce titre de transport ne préjudicie ni à l'existence, ni à la validité du contrat de transport.

Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait établi un billet de passage, ou si le billet ne contient pas les mentions indiquées ci-dessus, le contrat de transport n'en sera pas moins soumis aux règles de la présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés.

APPENDIX D

Comparison of the Provisions of Articles 3, 4 and 22 of the Warsaw Convention With the Amendments to These Provisions Made by the Hague Protocol.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly known as the Warsaw Convention, was signed at Warsaw on October 12, 1929. The United States declared its adherence thereto on June 27, 1934, effective October 29, 1934. 49 Stat. 3000, 3013; T.S. 876.

A Protocol to the Warsaw Convention was opened for signature at The Hague on September 28, 1955, and entered into force on August 1, 1963, with respect to those countries which deposited instruments of ratification of the Protocol on or before May 3, 1963. The Protcol has been signed but has not been ratified by the United States.

On the following pages the provisions of Articles 3, 4 and 22, respectively, of the Warsaw Convention are set forth on the left hand page, with the Hague Protocol amendments to these articles being shown on the facing page.

WARSAW CONVENTION

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I.—PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

HAGUE PROTOCOL

Article III

In Article 3 of the Convention—

(*a*) paragraph 1 shall be deleted and replaced by the following:

"1. In respect of the carriage of passengers a ticket shall be delivered containing:

(*a*) an indication of the places of departure and destination;

(*b*) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being the territory of another State, an indication of at least one such stopping place;

(*c*) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

(*b*) paragraph 2 shall be deleted and replaced by the following:

"2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 (*c*) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22."

WARSAW CONVENTION

SECTION II.—BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22 (2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which excluded or limit his liability.

HAGUE PROTOCOL

Article IV

In Article 4 of the Convention—

(*a*) paragraphs 1, 2, and 3 shall be deleted and replaced by the following:

"1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

(*a*) an indication of the places of departure and destination;

(*b*) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

(*c*) a notice to the effect that; if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage."

(*b*) paragraph 4 shall be deleted and replaced by the following:

"2. The baggage check shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1 (*c*)) does not include the notice required by paragraph 1 (*c*) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2."

WARSAW CONVENTION

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of finess of nine hundred thousandths. These sums may be converted into any national currency in round figures.

HAGUE PROTOCOL

Article XI

Article 22 of the Convention shall be deleted and replaced by the following:

"*Article 22*

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

2. (*a*) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

(*b*) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total

[WARSAW CONVENTION, Article 22]

weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger.

4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment."

CAB Form 37
(Rev. 2-66)

UNITED STATES OF AMERICA
WASHINGTON, D. C.

CIVIL AERONAUTICS BOARD

CERTIFICATION

I HEREBY CERTIFY *that the annexed is a true copy of the*

Agreement No. CAB 10559 and pages 290 through 301 of
Agreement No. CAB 7648

on file in this Board.

IN WITNESS WHEREOF, *I have hereunto subscribed my name, and caused the seal of the Civil Aeronautics Board to be affixed this* 11th *day of* December *one thousand nine hundred and* sixty-seven.

Secretary
CIVIL AERONAUTICS BOARD

Section 1324(d) of the Federal Aviation Act (49 U.S.C. 1324(d)) provides in pertinent part that "[p]ublications purporting to be published by the Board shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Board--in all courts [of any State, Territory, or federal]--without further proof or authentication thereof"; Section 701(e) (49 U.S.C. 1441(e)) provides "[n]o part of any report or any reports of the Board relating to any accident or the investigation thereof, shall be admitted in evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports"; and Section 1103 (49 U.S.C. 1503) provides that documents and reports filed with the Board shall be preserved as public records in the custody of the secretary of the Board and shall be received as prima facie evidence of what they purport to be--in all judicial proceedings", and that "copies of, and extracts from" records "certified by the secretary of the Board, under the seal of the Board, shall be received in evidence with like effect as the originals."

APPENDIX E

Conformed Copy
CCAB 10-55 Q
R-1 Thru R-3

INTERNATIONAL AIR TRANSPORT ASSOCIATION

NEW YORK BRANCH OFFICE
AND
TRAFFIC CONFERENCE 1 OFFICE

500 Fifth Avenue
New York 36, New York
TELEPHONE OXford 5-0862
CABLE ADDRESS INAIRTRANS

December 11, 1956

MEMORANDUM
(TC1/FRCS-Misc. 91)
(Ref. JT123/FRCS-Misc. 158 & 166,
TC1/FRCS-Misc. 79 & 82)

TO: All Members of Traffic Conferences 1, 2 and 3

FROM: Secretary

SUBJECT: Passenger Ticket - Conditions of Contract - Resolution 275b - TC1 Mail Vote 72

Please refer to Memorandum JT123/FRCS-Misc. 158 of August 8, 1956, concerning the institution of a mail vote on the subject of Passenger Ticket - Conditions of Contract, TC1 Mail Vote 60. This mail vote was amended by Memorandum JT123/FRCS-Misc. 166 of September 7, 1956. Subsequently, by Memorandum TC1/FRCS-Misc. 82 of October 29, 1956, Members were advised of an extension of the voting period for Mail Vote 60 until December 31, 1956.

2. Irrespective of the fact that the final outcome of TC1 Mail Vote 60 is still outstanding, the Director General has authorized the institution of a new mail vote on this subject, incorporating the substance of the previous mail vote, with the following changes:

(i) Omission of the last part of Para. (2)(a) in draft Resolution 275b - Passenger Ticket - Conditions of Contract, reading as follows:

"...however, if the place of departure and the place of destination are in the territory of the same country, at least one agreed stopping place outside such country is shown on the ticket."

(ii) Postponement of the deadlines of implementation of draft Resolutions 275 and 275b to October 1, 1957, instead of July 1, 1957.

3. The purpose of this new mail vote is only to satisfy the formal requirements of the Provisions for the Regulation and Conduct of Traffic Conferences. It is assumed that all Members who have already cast an affirmative vote on the previous occasion will, on the basis of their recorded position, cooperate now in formally recasting their affirmative vote on this occasion. The Director General is of the opinion that the deletion made in Para. (2)(a) of draft Resolution 275b, to satisfy the objection made by some of the Members to the original wording, makes the language of the Conditions of Contract more agreeable to Members. Although this change may cause difficulties with a certain government, the Director General will do his utmost to obtain approval of the language of the present mail vote, which represents years of work, many concessions in the interest of common agreement, and which will be a boon once it is adopted. As soon as the present mail vote has been concluded successfully, the old mail vote will be formally withdrawn by the Director General.

4. The attached mail vote is based on the following timetable:

11 December, 1956	- Circulation of Mail Vote
1 January, 1957	- 21-Day Voting Period Ends
3 January-18 February, 1957	- Filing Period
19 February, 1957	- Secretary Notifies of Government Approvals
1 March, 1957	- Intended Effectiveness Date.

5. Identical draft resolutions for application in the areas of Traffic Conferences 2 and 3 are being issued simultaneously by the Secretaries of Traffic Conferences 2 and 3. Members are requested, as usual, to file the attached draft resolutions provisionally, wherever required, with their respective government authorities. Filing formalities with the U.S. Civil Aeronautics Board will be accomplished on behalf of the U.S. Members by the Secretary of Traffic Conference 1

E. S. Pefanis

E. S. Pefanis
Secretary

Attachments

FORM OF PASSENGER TICKET AND BAGGAGE CHECK - AMENDING

100(Mail 72)275

Expiry Date Indefinite

Type A

RESOLVED, that Resolution 275 is amended by the insertion of the following Paragraph (4), subsequent paragraphs to be renumbered accordingly:

" (4) that the following notice shall be imprinted either on the outside front cover or on each passenger coupon of the ticket:

'If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.';

provided that each Member shall be required to implement the provisions of this paragraph only when it replaces its present ticket stock, but in no event later than 1 October, 1957."

Filing Period

3 January - 18 February, 1957

Intended Effectiveness Date

1 March, 1957

SPECIAL RESCISSION RESOLUTION

100(Mail 72)003a

Expiry Date Indefinite

Type A

RESOLVED, that Resolutions 128/275b and 110/275b are rescinded as of the date that Resolution 100(Mail 72)275b becomes effective.

Filing Period

3 January - 18 February, 1957

Intended Effectiveness Date

1 March, 1957

PASSLNGER TICKET - CONDITIONS OF CONTRACT

100(Mail 72)275b

Expiry Date Indefinite

Type A

RESOLVED, (1) that the Conditions of Contract on the inside cover of the Passenger Ticket and Baggage Check used for interline international carriage read as follows:

"Conditions of Contract"

" (1) As used in this contract, 'ticket' means 'Passenger Ticket and Baggage Check', 'carriage' is equivalent to 'transportation', and 'carrier' includes the air carrier issuing this ticket and all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage; 'damage' includes death, injury, delay, loss or other damage of whatsoever nature arising out of or in connection with carriage or other services performed by carrier incidental thereto. Carriage to be performed hereunder by several successive carriers is regarded as a single operation.

(2)(a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929, (hereinafter called 'the Convention') unless such carriage is not 'international carriage' as defined by the Convention. (See carrier's tariffs, conditions of carriage

for such definition). Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables; and carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; and for the purpose of the Convention the agreed stopping places (which may be altered by carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth in this ticket and any conjunction ticket issued herewith, or, as shown in carrier's timetables as scheduled stopping places on the passenger's route.

(2)(b) To the extent not in conflict with the foregoing, all carriage hereunder and other services performed by each carrier are subject to (i) applicable laws (including national laws implementing the Convention or extending the rules of the Convention to carriage which is not "international carriage" as defined in the Convention), government regulations, orders and requirements, (ii) provisions herein set forth, (iii) applicable tariffs, and (iv) except in transportation between a place in the United States and any place outside thereof, conditions of carriage, regulations and timetables (but not the time of departure and arrival therein) of such carrier, which are made part hereof and which may be inspected at any of its offices and at airports from which it operates regular services.

(2)(c) Unless expressly so provided, nothing herein contained shall waive any limitation of liability of carrier existing under the Convention or applicable laws.

(3) Insofar as any provision contained or referred to herein, may be contrary to a law, government regulation, order or requirement, which severally cannot be waived by agreement of the parties, such provision shall remain applicable and be considered as part of the contract of carriage to the extent only that such provision is not contrary thereto. The invalidity of any provision shall not affect any other part.

(4) Subject to the foregoing:

(a) Liability of carrier for damages shall be limited to occurrences on its own line, except in the case of checked baggage as to which the passenger also has a right of action against the first or last carrier. A carrier issuing a ticket or checking baggage for carriage over the lines of others does so only as agent.

(b) Carrier is not liable for damage to passenger or unchecked baggage unless such damage is caused by the negligence of carrier.

(c) Carrier is not liable for any damage directly and solely arising out of its compliance with any laws, government regulations, orders or requirements, or from failure of passenger to comply with same.

(d) Any liability of carrier is limited to 250 French

gold francs (consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths) or its equivalent per kilogram in the case of checked baggage, and 5,000 such French gold francs or its equivalent per passenger in the case of unchecked baggage or other property, unless a higher value is declared in advance and additional charges are paid pursuant to carrier's regulations. In that event the liability of carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.

(e) Any exclusion or limitation of liability of carrier under these conditions shall apply to agents, servants or representatives of the carrier acting within the scope of their employment and also to any person whose aircraft is used by carrier for carriage and his agents, servants or representatives acting within the scope of their employment.

(5) Checked baggage carried hereunder will be delivered to the bearer of the baggage check upon payment of all unpaid sums due carrier under carrier's contract of carriage or tariff.

(6) When validated, this ticket is good for carriage from the airport at the place of departure to the airport at the place of destination via the route shown herein and for the applicable class of service and is valid for one year from the date of commencement of flight except as otherwise provided in carrier's regulations. Each flight coupon will

be accepted for carriage on the date and flight for which accommodations have been reserved; when flight coupons are issued on an "open date" basis, accommodations will be reserved upon application subject to availability of space.

(7) Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch, but no particular time is fixed for the commencement or completion of carriage. Subject thereto, carrier may without notice substitute alternate carriers or aircraft and may alter or omit the stopping place shown on the face of the ticket in case of necessity. Times shown in timetables or elsewhere are approximate and not guaranteed, and form no part of this contract. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

(8) The passenger shall comply with all government travel requirements, present all exit, entry, and other documents required by the law, and arrive at the airport by the time fixed by carrier or, if no time is fixed, sufficiently in advance of flight departure to permit completion of government formalities and departure procedures. Carrier is not liable for loss or expense due to passenger's failure to comply with this provision.

(9) No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

(10)(a) No action shall lie in the case of damage to baggage, unless the person entitled to delivery complains to the carrier

forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt; and in the case of delay, unless the complaint is made at the latest within 21 days from the date on which the baggage has been placed at his disposal. Every complaint must be made in writing and dispatched within the times aforesaid. Where carriage is not 'international carriage' as defined in the Convention, failure to give notice shall not be a bar to suit where claimant proves that (i) it was not reasonably possible for him to give such notice, or (ii)that notice was not given due to fraud on the part of carrier, or (iii) the management of carrier had knowledge of damage to passenger's baggage.

(10)(b) Any right to damages against carrier shall be extinguished unless an action is brought within two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. The method of calculating the period of limitation shall be determined by the law of the court seized of the case."

(2) that notwithstanding anything contained in the applicable effectiveness resolution, each Member shall be required to include the above Conditions of Contract in its Passenger Tickets and Baggage Checks only when it replaces its present stock, but in no event later than 1 October, 1957.

Filing Period	Intended Effectiveness Date
3 January - 18 February, 1957	1 March, 1957

FORM OF PASSENGER TICKET AND BAGGAGE CHECK - AMENDING

110/275
212/275
311/275 - RESOLVED, that Resolution 275 is amended as follows:

1. Paragraph (1) to read:

"(1) that for interline carriage Members shall use the form of and procedure for the Passenger Ticket and Baggage Check hereinafter described: provided that prior to January 1, 1955 such use shall be optional; provided further that prior to January 1, 1955 Members may use alternatively the form and procedure authorized by the resolution effective on the date of adoption hereof;"

2. Paragraph (8) to read:

"(8) that, except as provided in Sub-paragraph 14(n), 14(o), 14(p), 14(q) and 14(r), herein, the form of auditors, flight and passenger coupons shall be as set forth in Attachment "A";"

3. Insert a new Paragraph (11) (renumbering subsequent Paragraphs accordingly) to read:

"(11) that flight coupons shall be used in sequence from the place of departure as shown on the passenger coupon."

4. Paragraph (13) to read:

"(13) that the sub-headings on the face of the coupon shall be dealt with as follows:

(a) Form Number

Coupons shall be provided with a form number of not more than four digits, the first digits of which shall be assigned company identification number and the last digit shall indicate whether the ticket is a one, two, three or four digit coupon type in accordance with the prescribed Code Numbers 1, 2, 3 and 4, respectively, assigned for this purpose;

(b) Serial Number

There shall be a Serial Number in the upper right-hand corner of the coupons and on the outside front cover, if any;

(c) For Carrier's Use Only

(i) When tickets are issued in conjunction with one another, or the total fare is comprised of combinations of published fares, the columns in the "For Carrier's Use Only" section entitled "From/To", "Carrier" and "Fare Construction" will be executed to indicate clearly and progressively the place of origin, places of change-over or stopover (or fare breakpoints where not on the route travelled, such breakpoints being encircled to denote clearly this fact) and place of destination, respectively, with names of carriers and fares relating thereto.
Name of places and carriers will be indicated by use of the abbreviations promulgated for such purpose by IATA.

(ii) When more than one fare is involved, all through and local fares used shall be entered in the "Fare Construction" column beside the appropriate section of the "From/To" column. The "Fare Construction" column shall be totaled opposite the word "Fare";

(d) Origin and Destination.
When the routing requires the issuance of more than one ticket issued in conjunction with one another, the original place of departure under the first ticket and the final destination under the last ticket shall be entered in full, respectively in the boxes entitled "Origin" and "Destination" on eabh of the tickets issued:

(e) Conjunction Ticket(s)

The form and serial number of any other tickets issued as part of the same air carriage shall be entered in the box entitled "Conjunction Ticket(s)";

(f) Issued in Exchange for

Insert the form and serial numbers, and date and place of original issue of any document for which the ticket was exchanged:

(g) Date and Place of Issue

The date and place and name of agent or carrier issuing the ticket shall be entered by stamp or writing in the space entitled "Date and Place of Issue";

NON

(h) Fare

The fare to be entered in the box entitled "Fare" shall be the total fare (excluding tax) covered by the ticket or the tickets issued in conjunction with one another; provided that any surcharges such as for sleeping accommodation, shall be covered by a separate ticket, suitably endorsed, or an exchange order, prominently marked to indicate the type of accommodation or additional service sold:

(i) Equivalent Amount Paid

The amount and type of currency collected when payment is in a currency other than that quoted in Carrier's tariffs or timetables shall be entered in the box entitled "Equivalent Amount Paid";

(j) Tax

The amount of tax shall be entered in the box entitled "Tax";

(k) Total

The sum of the fare and tax shall be entered in the box entitled "Total";

(l) Form of Payment

Insert the type of document, if any, for which the ticket was exchanged in accordance with the following abbreviations:-

XO	-	Exchange Order
PT	-	Prepaid Ticket Advice
TP	-	Universal Air Travel Plan followed by code of contractor and account number only
GR	-	Government Transportation Request/ Government Warrant followed by the form and serial number of such document
TV	-	Travel Fares
UN	-	United Nations Transportation Request

(m) Fare Class/Basis

The appropriate designator shall be entered in the column entitled "Fare Class/Basis" opposite each section of the journey to which it applies; provided that the class of travel applicable to each coupon shall be spelled out "First" or "Tourist"; provided that where the appropriate ticket designator is applicable to the whole of the journey shown on the ticket, it shall be entered in the unnamed box immediately to the left of the "Name of Passenger" box;

(n) Valid Until

The fare expiry date shall be entered in the column headed "Valid Until" opposite each respective section of the journey to which it applies; provided that where travel must be completed within a limited number of days from commencement of travel, such number of days shall be inserted after the fare designator in the "Fare Basis" box, and the "Valid Until" box shall not be completed until a specific reservation is entered on the ticket; in the latter case, either the date of fare expiry or the date by which travel must be completed, whichever is earlier, shall be entered in the "Valid Until" box;

(o) Baggage

The applicable free baggage allowance(s) shall be shown in the column marked "Free Allowance"; the total number of checked pieces of baggage of the passenger and their total weight must be shown in the space entitled "Checked" opposite the city at which the baggage is accepted, provided that, where pooling of baggage is permitted by Members, the following procedure shall apply;

(i) Baggage of all members of the group shall be checked only on the ticket of the head of the group;

(ii) The symbol "Pl, 1.2.3" etc. shall be written in block letters in the box entitled "Free Baggage Allowance" on the tickets of all members of the group;

(iii) Where excess baggage is involved, an Excess Baggage Ticket shall be issued to the head of the group which shall be identified in a similar manner to that referred to in (ii) above;

(p) Good for Passage

Appropriate entries shall be made in the column entitled "Good for Passage" as follows:

(i) In the case of one-flight coupon tickets, the city of departure shall be entered on the first line and the city of destination on the subsequent line;

(ii) In the case of tickets having more than one flight coupon, the place of departure shall be entered on the first line and on the successive lines the places where each particular flight terminates shall be entered;

(iii) Where more than one ticket is issued for a journey, the place shown on the last line of preceeding ticket shall be duplicated on the first line of the succeeding ticket;

(iv) Notwithstanding Sub-paragraph (ii) above, where an open-jaw routing involves surface transportation for a portion of travel between the point of origin and point of destination, the good for passage box relating to such portion of travel shall be marked "void------void" and the pertinent flight coupon shall be extracted before delivery of the ticket to the passenger. (Thus, an open-jaw routing from London to Paris and from Brussels to London would require a 3-coupon type ticket, the middle flight coupon of which would be extracted before delivery of the ticket to the passenger, and completed as follows:-

Fare Basis	Valid Until	Checked Pos.	Checked Wt.	Unck'd Wt.	From / To	Via Carrier	Flt No.	Date	Time	Res. Status
					From LONDON					
					To PARIS					
					To BRUSSELS					
					To LONDON					
					To					

(q) Via Carrier

The Official Carrier abbreviation, as published by IATA shall be shown in the columns entitled "Via Carrier";

(r) Flight Number, Date and Time

Appropriate entries shall be made in the boxes entitled "Date" and "Time", the month being abbreviated in letters. The flight (line) number shall be entered in the box entitled "Flight No.";

(s) Reservation Status

The column entitled "Res. Status" will be completed for each section of the trip to indicate the status of the reservation either as "Confirmed", "Not Confirmed" or "Not Requested" by use of the designators "OK", "NO", or "OPEN" respectively;

(t) Name of Passenger

The name of passenger shall be inserted in the box entitled "Name of Passenger"; provided that the use of this ticket shall be limited to one person only;

(u) Carbon

Where spot or interleaf carbon is used, it shall be permanently bound in the ticket; no carbon backing shall be used for the endorsement box.

(v) Accounting Use Only

Entries inthis box are reserved for accounting department use only.

5. By deletion of sub-paragraphs 14(k) and 14(n) and the relettering of subsequent sub-paragraphs.

6. By addition of a new sub-paragraph 14(n) to read:

"(n) Entry in the boxes entitled "Fare", "Tax" and "Total" of the abbreviation "Cy" for type of currency."

7. By addition of a new sub- paragraph 14(o) to read:

"(o) Substitution in the "For Carrier's Use Only" section of the ticket of a single column entitled "Fare Construction" in place of the double column headings entitled "Published" and "Converted".

8. By addition of a new sub-paragraph 14(p) to read:

"(p) Inclusion of a vertical dotted line in the box entitled "Fare Class/Basis".

9. By addition of a new sub-paragraph 14(q) to read:

"(q) Printing and use of an additional "For Carrier's Use Only" section (as set forth in Attachment "A")".

10. By addition of a new sub-paragraph 14(r) to read:

"(r) Use of a simplified version of the Passenger ticket and Baggage Check to be used only where no conjunction ticket is issued; as set forth in Attachment "B"; provided that:

(i) the double column entitled "Fare Construction" may be combined and entitled "Published Fare".

(ii) the Auditor's Coupon of all such tickets be clearly overprinted with the words "This Ticket not to be issued in conjunction"."

11. By addition of a new sub-paragraph 14(s) to read:

"(s) Use of Shading

In the boxes of the "Good for Passage" sections on each flight coupon which are outside the portions outlined by heavy rule in order to emphasize the portion of carriage to which each flight coupon applies."

Filing Date	Expiry Date	Type
January 1, 1954	Indefinite	B

"Optional Extension"

FOR CARRIER'S USE ONLY			
Issue No.	CARRIER	FARE CONSTRUCTION	
		PUBLISHED	CONVERTED
SUB TOTAL			

Issued By
INTERNATIONAL AIRWAYS
SUBJECT TO CONDITIONS OF CONTRACT (See Footnote No. 1)

PASSENGER TICKET AND BAGGAGE CHECK FLIGHT COUPON NO. 1

FOR CARRIER'S USE ONLY			
Issue No.	CARRIER	FARE CONSTRUCTION	
		PUBLISHED	CONVERTED
FARE			
EQUIVALENT AMOUNT PAID			
TAX			
TOTAL			
FORM OF PAYMENT			

COMPLETE ROUTING THIS TICKET AND CONJUNCTION TICKET(S)

ORIGIN — Form — Serial No.

DESTINATION — Form — Serial No.

ISSUED IN EXCHANGE FOR — DATE AND PLACE OF ORIGINAL ISSUE

Form — Serial No.

Acctg. Use Only

DATE AND PLACE OF ISSUE OF THIS TICKET

ENDORSEMENTS

FARE CLASS/BASIS	VALID UNTIL	BAGGAGE: FREE ALLOW.	BAGGAGE: Checked Pcs.	BAGGAGE: Checked Wt.	BAGGAGE: Unch'd Wt.	ROUTE FOR PASSAGE BETWEEN POINTS NOTED BY AGENT ONLY: FROM	VIA CARRIER	Flight Number	DATE	TIME	Non Stop
						TO					
						TO					
						TO					
						TO					

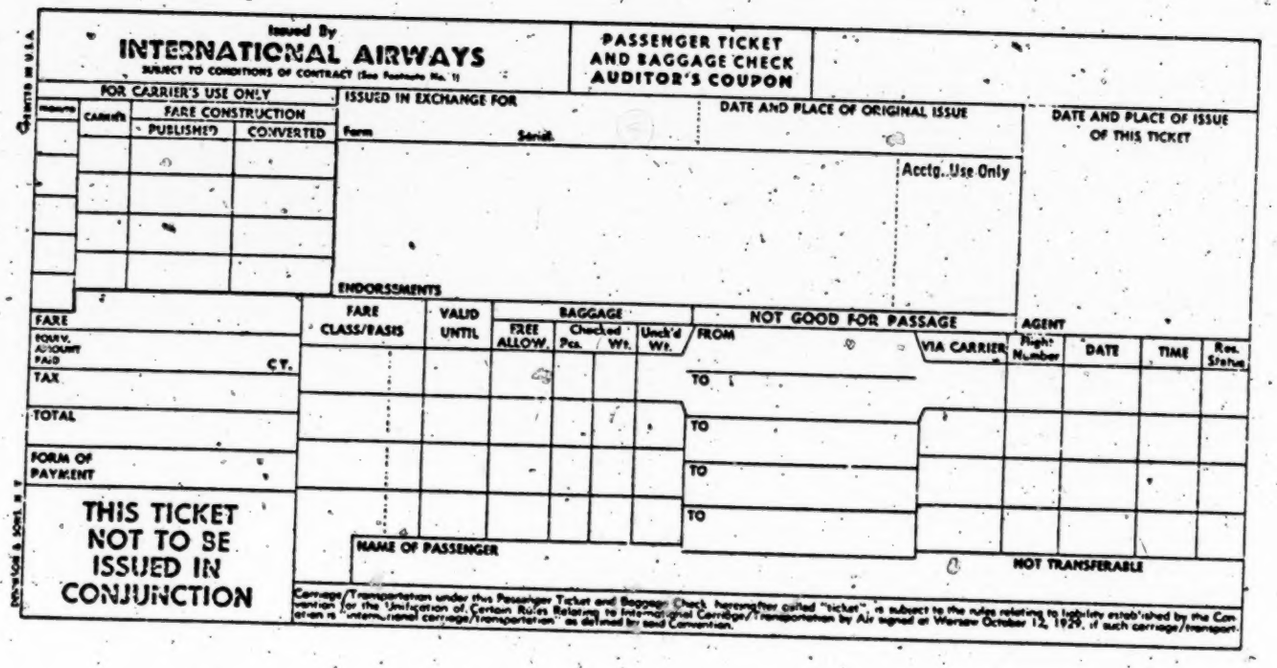
AGENT

NAME OF PASSENGER

NOT TRANSFERABLE

Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called "ticket", is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929, if such carriage/transportation is "international carriage/transportation" as defined by said Convention.

* When optional extension used, carriers may insert the words "Sub-total" in this box.



Issued By
INTERNATIONAL AIRWAYS
SUBJECT TO CONDITIONS OF CONTRACT (See Footnote No. 1)

PASSENGER TICKET AND BAGGAGE CHECK AUDITOR'S COUPON

FOR CARRIER'S USE ONLY

Issued to	Carrier's	FARE CONSTRUCTION PUBLISHED	FARE CONSTRUCTION CONVERTED

ISSUED IN EXCHANGE FOR
Form Serial

DATE AND PLACE OF ORIGINAL ISSUE

DATE AND PLACE OF ISSUE OF THIS TICKET

Acctg. Use Only

ENDORSEMENTS

	FARE CLASS/BASIS	VALID UNTIL	BAGGAGE FREE ALLOW.	BAGGAGE Checked Pcs.	BAGGAGE Checked Wt.	BAGGAGE Unch'd Wt.	NOT GOOD FOR PASSAGE FROM / TO	VIA CARRIER	AGENT Flight Number	DATE	TIME	Res. Status
							TO					
							TO					
							TO					

FARE
EQUIV. AMOUNT PAID C.T.
TAX
TOTAL
FORM OF PAYMENT

THIS TICKET NOT TO BE ISSUED IN CONJUNCTION

NAME OF PASSENGER

NOT TRANSFERABLE

Carriage/Transportation under this Passenger Ticket and Baggage Check, hereinafter called "ticket", is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929, if such carriage/transportation is "international carriage/transportation" as defined by said Convention.

CONDITIONS OF CONTRACT - PASSENGER TICKET - AMENDING

110/275b
212/275b - (Note)
311/275b - (Note)
- RESOLVED, (1) that Resolution 275b is amended by the following changes to the text of the "Conditions of Contract".

(a) Addition of the words "or undertake to carry" after the word "carry" in the definition of "Carrier" in Paragraph 1.

(b) Deletion of the clause "'Carrier' includes agents, servants, or representatives of any such air Carrier" from Paragraph 1.

(c) Addition to the first parenthetical phrase in Sub-Paragraph 2(b) of the following: "or extending the rules of the convention to carriage which is not 'international carriage' as defined in the Convention"

(d) Deletion from Sub-paragraph 2(c) of the opening words "It is agreed that".

(e) Substitution of "Carrier's regulations" for "Carrier's tariffs" in the second line of Sub-paragraph 2(c).

(f) Substitution of "performed by a carrierincidental thereto" for "hereunder" in the second line of Sub-paragraph 4(a).

(g) Insertion of the word "of" after the word" consisting" in the parenthetical expression of Sub-paragraph 4(c).

(h) Amendment of Sub-paragraph 4(e) to read as follows:

"A carrier issuing a ticket or checking baggage for carriage over the lines of others does so only as agent. Liability of carrier for death, injury or delay of a passenger, or loss, damage or delay of baggage shall be limited to occurrences on its own line, except in the case of checked baggage as to which passenger also has a right of action against the first or last carrier."

(i) Replacement of Sub-paragraph 4(f) by the following:

"(f) No action shall be maintained in the case of damage to baggage or other property unless written notice of the claim is presented to an office of carrier within three days from the date of receipt thereof; and in the case of delay or loss, unless such written notice is so presented within 14 days from the date the baggage or other property is placed at the passenger's disposal (in case of delay) or should have been placed at the passenger's disposal (in case of loss)."

"Any right to damages against Carrier shall be extinguished unless an action is brought within two years after the occurrence of the events giving rise to the claim."

(j) Insertion of a new Sub-paragraph 4(g) to read as follows:

"Whenever the liability of the Carrier is excluded or limited under these conditions, such exclusion or limitation shall apply to agents, servants or representatives of any such air carrier."

(k) Amendment of Paragraph 5 to read as follows:

"Checked baggage carried hereunder will be delivered to the bearer of the baggage check upon payment of all unpaid sums due to Carrier under the contract of carriage and upon return to Carrier of the baggage (claim) tag(s)."

(l) Amendment of Paragraph 6 to read as follows:

"When validated, this ticket is good for carriage from the airport at the place of departure to the airport at the place of destination via the route shown herein and for the applicable class of service and is valid for one year from the date of commencement of flight except as otherwise provided in Carrier's regulations. Each flight coupon will be accepted for carriage on the date and flight for which accommodations were reserved; when flight coupons are issued on an "open date" basis accommodations will be reserved upon application subject to availability of space."

(m) Substitution of the words "If it considers that it would be advisable to do so" for "if it deems advisable" in lines 3 and 4 of Paragraph 7 and substitution of "carriage" for "passage" in line 5 of Paragraph 7.

(n) Deletion of the present Paragraph 8, subsequent Paragraphs to be numbered accordingly.

(2) that a new Paragraph (2) is added as follows:

"(2) that notwithstanding anything contained in the applicable effectiveness resolution, each Member shall be required to effect the amendments provided in Resolution 110/275b, only when it replaces its present stock, but in no case later than 1 January, 1955.

212/275b - Identical to 110/275b except that "110/275b" reads "212/275b".

311/275b - Identical to 110/275b except that "110/275b" reads "311/275b".

Filing Date	Expiry Date	Type
January 1, 1954	Indefinite	A

SUPREME COURT, U. S.
MOTION FILED DEC 26 1967

IN THE

Supreme Court of the United States

October Term, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* and BRIEF FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

EDWIN LONGCOPE
26 Broadway
New York, New York 10004
Attorney for the United Kingdom of Great Britain and Northern Ireland

December 20, 1967

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ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

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v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The United Kingdom of Great Britain and Northern Ireland moves this honorable Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari in the above entitled cases.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondent has refused consent. Accordingly, leave of this Court is sought under the terms of Rule 42 of the Court's Revised Rules.

The nature of the movants' interest, and its reasons for believing that these cases present an issue of grave international concern, are set forth in the attached brief.

For the foregoing reasons, it is respectfully requested that this motion for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

For the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,
by its attorney

EDWIN LONGCOPE
26 Broadway
New York, N. Y. 10004

December 20, 1967

IN THE

Supreme Court of the United States

October Term, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED KINGDOM AS *AMICUS CURIAE*

Introduction

The United Kingdom of Great Britain and Northern Ireland respectfully submits this brief as *amicus curiae* in support of the petitioner, Alitalia-Linee Aeree Italiane, S.p.A. ("Alitalia") on a writ of certiorari, granted by this Honorable Court, to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above entitled cases on December 16, 1966, 370 F.2d 508.

I.

Nature of the Interest of the United Kingdom.

The United Kingdom is concerned in this case by the unilateral action of the courts of the United States in interpolating into an international agreement—in this instance the Warsaw Convention of 1929[1]—a provision which is not to be found in the express wording of the Convention. The United Kingdom is one of the original signatories to this Convention.

The primary purpose of the drafters of the Warsaw Convention was to achieve unification of all the laws governing international air transportation.[2] The Convention created a right to limitation of liability for the injury or death of a passenger,[3] predicated upon the delivery of a ticket to the passenger.[4] In the instant case the judgments below of the District Court,[5] and the Court of Appeals for the Second Circuit,[6] would read into the Convention a new provision that the failure of a carrier to give, in the passenger ticket, what the courts of the United States deem to be adequate notice of the Convention limits of liability will deny to the carrier the benefits of such limitation.

A recent article has noted that this decision of the courts below is "breaking a chain of hundreds of prece-

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[1] Convention For The Unification of Certain Rules Relating To International Transportation, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876. (effective Oct. 29, 1934) [hereinafter cited as Warsaw Convention].

[2] Warsaw Convention preamble, 49 Stat. 3014.

[3] Warsaw Convention art. 22, para. 1, 49 Stat. 3019.

[4] Warsaw Convention, art. 3, para. 1, 49 Stat. 3015.

[5] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F.Supp. 237 (S.D.N.Y. 1966).

[6] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966).

dents"[7] founded on the express policy of the United States to achieve uniformity of law in the area of international plane disasters in preference to limitation of liability.[8] It is also to be noted that the decisions below are in conflict with the official position taken by the United States Government at the Hague Conference in 1955, that Article 3(2) of the Convention does not impose the sanction of denial of limitation of liability for failure to give "notice" in the passenger ticket as to the applicability of the Convention's limits of liability.[9] Moreover, the decisions below conflict with the official position of the United States in refusing to ratify the Hague Protocol of 1955, which did require that "notice" be given in the passenger ticket as to the applicability of Convention limits of liability.[10]

It is the interest of the United Kingdom that the United States of America, and all other contracting parties to the Convention, should give effect to the Convention in accordance with its express terms, and that the uniformity of law which the Convention establishes should not be destroyed or frustrated by the construction placed upon its provisions by the unilateral decisions of the courts of the contracting parties. The United Kingdom therefore urges that the decisions of the courts below should be rejected by this Honorable Court.

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[7] Lowenfeld & Mendelsohn, *The United States And The Warsaw Convention*, 80 Harv. L. Rev. 497, 512 n. 64 (1967).

[8] *E.g., Block* v. *Compagnie Nationale Air France*, 229 F.Supp. 801, 805 (N.D. Ga. 1964), citing *Wyman* v. *Pan Am. Airways, Inc.*, 181 Misc. 963, 43 N.Y.S. 2d 420 (1943), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945).

[9] I. International Conference On Private Air Law, The Hague, Sept. 1955, ICAO Doc. 7686—LC/140 at 134 (1955).

[10] *See generally* Lowenfeld & Mendelsohn, *supra* at 511-546.

II.

The Proceedings Below.

These cases arise out of claims on behalf of passengers on an Alitalia aircraft which crashed on February 26, 1960, while en route from Rome to New York. The passenger tickets were the IATA uniform passenger ticket, heretofore approved by the Civil Aeronautics Board,[11] and which is the standard ticket for virtually all international air traffic. The ticket contained notice thereon that it was subject to the provisions of the Warsaw Convention.

The District Court held that the size of type used in the "notice" provision was so small as to be "virtually invisible", that it did not therefore give adequate notice of the applicability of Convention limitations on liability, and was not in compliance with the provisions of Article 3(1) of the Convention.[12] The defendant carrier was therefore denied the limitations on liability granted by Article 22 of the Convention.

A majority of the Court of Appeals, in affirming the judgment of the District Court, observed that terms of the Convention were "arbitrary limitations on liability which have been severely and repeatedly criticized . . ."[13] They further noted that "a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice."[14] Judge Moore, dissenting in the

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[11] *Pan Am. World Airways, Inc.*, 24 C.A.B. 575 (1957).

[12] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F.Supp. 237 (S.D.N.Y. 1966).

[13] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 512 (2d Cir. 1966).

[14] *Id.* at 514.

Court of Appeals, stated that "the majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it."[15]

III.

Argument.

(a) The Judgments Below Are Based on a Manifest Dislike For Limited Liability Provisions.

The fundamental purpose of the Warsaw Convention, as its preamble indicates, was to establish uniform documentation and provisions regulating liability in international air transportation. This purpose would be defeated by a unilateral interpretation placed upon the provisions of Article 3(1) by the courts of one of the contracting parties. The way would then be opened to varying or differing interpretations by the courts of other contracting countries, which would reduce the Convention to a meaningless shambles. The end result could only be to impugn the integrity and good faith of countries signatory to such treaties and defeat the essential need for a uniform scheme of applicable law in the field of international air transportation.

The comments of the majority of the Court of Appeals, in criticizing the Convention as "arbitrary" and giving a "one-sided advantage" to the carrier[16] manifest the majority's dislike for the Convention's limitations on liability and supply the motivation for their decision upholding the judgment of the District Court. This action by the majority is aptly characterized by Judge Moore in his dissenting opinion, wherein he stated:

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[15] *Id.* at 515.

[16] *Id.* at 508, 512-513.

> "The majority in their opinion indulge in judicial treaty making.
>
> . . . .
>
> The majority do not approve of the terms of the treaty and, therefore, by judicial fiat, they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability." [17]

The United Kingdom considers that the decision of the majority of the Court of Appeals, based as it was upon their manifest dislike for the limited liability provisions of the Convention, exceeds the proper bounds of judicial interpretation of treaties. Reference is made on this point to the decision of this Court in *Maximov* v. *United States*, 373 U.S. 49, (1963), wherein this Court stated, at page 54:

> " . . . it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."

The United Kingdom joins in the statement of Judge Moore in his dissent below that:

> "The language of the treaty is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem." [18]

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[17] *Id.* at 515.

[18] *Id.* at 515.

(b) Article 3(1) of the Warsaw Convention Contains No Sanction For Failure to Give Notice of Convention Limits of Liability.

Article 3(1) of the Convention, which is the provision here in issue, states the particulars which are to be set forth in the passenger ticket, including:

> "(e) a statement that the carriage is subject to the rules relating to liability established by this Convention."

Nowhere does the Article in question impose any sanction for failure to state the particulars mentioned, nor does it prescribe the form or content of the statement mentioned in (e) above.

Article 3(2) does impose a sanction of denial of limitation of liability for failure to deliver a ticket to the passenger. The courts below would interpolate this same sanction into the provisions of Article 3(1), where it is not expressed.

(c) The Judgments Below Conflict With the History of the Convention and the Official Position of the United States.

The history of the drafting of the Convention has been fully set forth in the briefs heretofore filed in this matter by the petitioner, Alitalia. It is evident from this history that the sanction which the courts below would write into Article 3(1) is contrary to the intention of the drafters of the Convention. They considered and rejected a proposal to deny limitation for failure to give notice in the passenger ticket as to the applicability of Convention liability limits.[19]

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[19] II Conference Internationale de Droit Prive Arien, Oct. 1929, Varsovie, ICAO Doc. 7838, at 100-101, 129, 168 (1930).

Further, the provision which the court below would read into Article 3(1) of the Convention is contrary to the position taken by the United States at the Hague Conference in 1955, that the sanction of unlimited liability does not apply *"if the ticket does not include the notice required by paragraph 1(c) of this Article . . ."* (emphasis added).[20] The decision of the court below also ignores the fact that the Hague Conference of 1955 considered and rejected a proposal by the United States to fix the size of the letters in the notice provision.[21]

Although the Hague Protocol extended the scope of sanctions to the failure to give notice on the passenger ticket of Convention limits of liability, the United States has not ratified or adopted that Protocol.

(d) The Prior Actions of the Civil Aeronautics Board on the Matter of Notice of Convention Limits of Liability Obviate any Need for Judicial Cognizance of the Matter.

In maintaining its position that the uniformity of international agreements should not be disrupted by the unilateral judicial action by the courts of a contracting nation, the United Kingdom is not unmindful of the views expressed by this Honorable Court as to matters affecting the foreign relations of a country. Reference is made to the comments of this Court in *Baker* v. *Carr*, 369 U.S. 186 (1961), as follows:

> "There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues fre-

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[20] I International Conference on Private Air Law, The Hague, Sept. 1955, ICAO Doc. 7686—LC/140 at 134 (1955).

[21] *Id.* at 124.

quently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or the legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet, it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of the management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action."

In keeping with the foregoing views expressed by this Court it is submitted that reference to the recent history of the Warsaw Convention would show that the issue here raised has been dealt with by the political or executive branch of the United States Government and would not appear to require judicial cognizance.

It has been noted elsewhere in the briefs submitted in this matter that the form of ticket in issue had the express approval of the Civil Aeronautics Board in 1957. In 1963 the said Board, acting within its jurisdiction over airline carriers, saw fit to prescribe by regulation[22] the form of notice of Convention liability limits which it deemed to be adequate. This notice took the form of signs posted on ticket counters and, at the carrier's option, separate printed statement on the ticket envelope, or the ticket itself. The United Kingdom deems it to be significant that in the exercise of its so-called "expertise" to deal with these matters the said Board perceived no need to alter, amend or modify the provisions of the Convention and deemed its prescribed form of notice to be adequate. In light of this action by the executive branch of a contracting country it is not per-

[22] 14 C.F.R. § 221. 175 (1967).

ceived why there should remain any issues for judicial cognizance by the courts of the same country, or why such judicial action should be at variance with that of the contracting country.

(e) A Decision of this Court Upholding the Judgments Below Would Imperil the Limitation Provisions of the Montreal Agreement.

Further, the United Kingdom looks with grave concern to the consequences which the upholding of the decision of the courts below would have upon the most recent attempts to achieve uniformity of law in the limitation of liability for airline accidents.

Between the dates of June 20, 1957 and November 15, 1965 the legislative and executive branches of the United States Government were unable to resolve or agree upon the problems presented by the Hague Protocol amendments to the Warsaw Convention. Various proposals were considered by appropriate committees of the Congress and the departments of the Executive. These proposals ranged from withdrawal from the Warsaw Convention to the adoption of the Hague Protocol, supplemented by a compulsory insurance scheme paid for by the air lines. Finally, on November 15, 1965 the United States of America issued its denunciation of the Warsaw Convention,[23] to become effective within six months thereafter, pursuant to the terms of the Convention.[24] This denunciation was subsequently withdrawn on May 13, 1966[25] in consequence of an agreement reached at the International Civil Aviation Organization Conference in Montreal in May, 1966. This agreement between air carriers engaged in international

[23] 53 Dep't State Bull. 923 (1965).

[24] Warsaw Convention art. 39, 49 Stat. 3022.

[25] 54 Dep't State Bull. 955 (1966).

transportation provided for an increase to $75,000 in the limits of liability, and for liability without fault. Thus, the withdrawal by the United States of its denunciation of the Warsaw Convention served to reaffirm its policy to maintain uniformity of law in international air transportation, in preference to unlimited liability in international airplane disasters.

The Montreal agreement[36] contains a provision for a ticket envelope insert, in ten point type, giving notice of its limitations of liability.[37] A decision of this Court affirming the judgments below opens the prospect that the notice provision of the Montreal agreement would likewise be subjected to future judicial examination, by the courts of the United States, with the possible outcome that if the form of notice therein prescribed should also be found inadequate by the United States Courts the contracting carriers would be subjected to absolute liability without the right to limitation.

CONCLUSION

The issue presented in the instant cases far transcends the mere question of the sufficiency of the type used on the "notice" provision of the standard passenger ticket. The real issue is whether the decision of the Court of Appeals directly conflicts with the provisions of the Warsaw Convention and whether the courts of a member state should be permitted to rewrite the Convention because of their disapproval of a particular provision. Such unilateral action by the courts of the United States directly conflicts with the manifest intention of the drafters of the Convention who rejected a proposed provision which would have

[36] Sometimes known or referred to as the "Special" or "Interim" agreement.

[37] 31Fed. Reg. 7302 (1966).

penalized a carrier for failure to notify a passenger of the application of the Convention. It conflicts with the position taken by the United States at the Hague Conference in 1955, that the sanction of unlimited liability does not apply where a passenger ticket fails to give notice of provisions of the Convention, and it conflicts with the refusal of the United States to ratify the Hague Protocol which does contain the sanction of unlimited liability where a passenger ticket fails to give notice of the provisions of the Convention.

Affirmation of the judgments below would result in unlimited liability for air carriers in the United States. This result, coupled with the liability without fault established in the Montreal agreement would place upon air carriers an unbearable burden and would inevitably lead to the necessity for formulating new measures which would survive unilateral court interpretation. If the decision of the Court of Appeals is to be confirmed the Government of the United Kingdom is concerned that it should have to take appropriate action to protect its carriers from unlimited liability regardless of fault.

It is therefore respectfully urged that the judgment of the court below should be reversed and that there should not be read into the Warsaw Convention provisions which are not to be found in its express wording.

Respectfully submitted,

EDWIN LONGCOPE
26 Broadway
New York, New York 10004
Attorney for the United Kingdom of Great Britain and Northern Ireland

December 20, 1967

Certificate of Service

I hereby certify that copies of this motion and the attached brief have been served upon

AUSTIN P. MAGNER, Esquire
GEORGE N. TOMPKINS, JR., Esquire
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

THEODORE E. WOLCOTT, Esquire
Attorney for Respondents
36 West 44th Street
New York, New York 10036

HAROLD L. WARNER, JR., Esquire
Attorney for International Transport Association
25 Broadway
New York, New York 10004

JOHN E. STEPHEN, Esquire
JOSEPH F. HEALY, JR., Esquire
Attorneys for Air Transport Association of America
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

ALFRED C. CLAPP
Counsel for the Republic of Italy
44 Broad Street
Newark, N. J.

Such service was made by posting the foregoing documents by first class mail.

EDWIN LONGCOPE

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, etc., *et al.*,

Respondents.

MOTION OF BATES BLOCK FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

LEE S. KREINDLER,
Of Kreindler & Kreindler,
Counsel for Applicant,
Bates Block, as Executor of the Estate of Charles Baxter Jones, Jr. and as Guardian and Next Friend of three minor children of Charles Baxter Jones, Jr. and Julia Lowry Block Jones, deceased.
Office and P. O. Address,
99 Park Avenue,
New York, New York 10016.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, etc., *et al.*,

Respondents.

MOTION OF BATES BLOCK FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Bates Block, as Executor of the Estate of Charles Baxter Jones, Jr., and as Guardian and Next Friend of three minor children of Charles Baxter Jones, Jr., and Julia Lowry Block Jones, deceased, respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The attorney for the petitioner herein, Austin P. Magner of the firm of Condon & Forsyth, 1 Rockefeller Plaza, New York, New York, has refused to consent to applicant's filing of such brief as *amicus curiae*. The attorney for the respondents, Theodore E. Wolcott, of 36 West 44th Street, New York, New York, has also refused to consent to the filing of such brief as *amicus curiae*. Accordingly, leave of this Court is sought under Rule 42 of this Court's Revised Rules.

The applicant has an interest in this case in that he now has pending an action for the wrongful deaths of his two decedents in the United States District Court for

the Northern District of Georgia, Atlanta Division (Civil Action Nos. 8266, *et al.*) entitled "Bates Block, et al., v. Compagnie Nationale Air France", in which one of the issues involved is the same as that presented for decision in the instant case, viz., did the airline ticket "delivered" to the passenger provide adequate notice of the limitation of damages contained in Article 22 of the Warsaw Convention (49 Stat. 3000-3026), to permit the airline to take advantage of said limitation?

The *Block* action, involving two deaths resulting from the crash of an Air France Boeing 707 jet at Orly Field, Paris, France, is one of 45 actions consolidated for trial and currently pending in said Federal Court in Georgia. The decedents were members of the Atlanta Art Association which had arranged the charter flight with Air France. The Fifth Circuit recently affirmed the trial court's decision denying applicant's motion to strike the Warsaw Convention as a defense. *Block* v. *Compagnie Nationale Air France,* —— F. 2d ——, 10 Avi. 17, 518 (5th Cir. Nov. 8, 1967). Plaintiffs had argued that the Warsaw Convention, by its language and history, did not apply to charter flights. In denying plaintiffs' motion which sought to strike the defense based on the Warsaw Convention the District Court stated that tickets were delivered to the passengers three weeks prior to the departure of the flight. These tickets allegedly "delivered" to Mr. Block's decedents were identical (with respect to the issue at bar) in language, size of type, and legibility, to the Alitalia ticket currently before this Court. The question of the adequacy of the notice contained in the ticket was not considered by the Fifth Circuit, but this issue will be raised at the trial of the *Block* action.

Applicant's counsel, Lee S. Kreindler, and his firm, Kreindler & Kreindler, represent the estates of sixty-two passengers (including Mr. Block's decedents) who died in the Air France accident. Furthermore, applicant's counsel's firm represents many other airline passengers in cases

pending in both State and Federal Courts in which the Warsaw Convention is involved.

Applicant Block respectfully submits that the legislative history of the Warsaw Convention, as well as the issue of the equivocal nature of the language of the ticket (as opposed to its type size) were not presented by respondent in adequate detail in the brief filed with the Court of Appeals for the Second Circuit. The applicant, desiring to develop these areas fully, does not believe that they will be sufficiently elaborated for this Court's consideration by the present parties.

Leave to file briefs as *amicus curiae* has been granted by this Court to the International Air Transport Association, the Air Transport Association of America, and the Republic of Italy, all of whom support the petitioner's position. Only one individual, Arnold Holtzman, has been granted leave to file a brief *amicus curiae* in support of the respondent's position.

The effect of this Court's determination in the instant case upon the air travelling public will be both far reaching and vital. It is believed that the arguments which applicant desires to make will aid the Court in reaching a decision, and if they are adopted, the results below will be affirmed.

Respectfully submitted,

LEE S. KREINDLER,
Of Kreindler & Kreindler,
Counsel for Applicant,
Bates Block, as Executor of the Estate of Charles Baxter Jones, Jr. and as Guardian and Next Friend of three minor children of Charles Baxter Jones, Jr. and Julia Lowry Block Jones, deceased.
Office and P. O. Address,
99 Park Avenue,
New York, New York 10016.

Certificate.

This is to certify that on the 2nd day of January, 1968, copies of the above application to appear as *amicus curiae* have been forwarded to Messrs. Condon & Forsyth, 1 Rockefeller Plaza, New York, New York 10020, attorneys for petitioner Alitalia-Linee Aeree Italiane, S.p.A., and Theodore E. Wolcott, Esq., 36 West 44th Street, New York, New York 10036, attorney for respondents John Lisi, *et al.*

Lee S. Kreindler

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No. 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ARNOLD HOLTZMAN AS *AMICUS CURIAE*

STUART M. SPEISER
Counsel for amicus curiae
Arnold Holtzman
200 Park Avenue
New York, N. Y. 10017

CHARLES F. KRAUSE
ALFRED W. GANS
DONALD W. MADOLE
SPEISER, SHUMATE, GEOGHAN & KRAUSE
Of Counsel

January 18, 1968

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Eck v. United Arab Airlines, Inc. (1964), 15 NY2d 53, 255 NYS2d 249, 203 NE2d 640, 1 ALR3d 1260	25, 105, 109
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Egan v. Kollsman Instrument Co. and American Airlines, Inc., No. 584 New York Court of Appeals (1967)	7, 9, 106

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Blackstone's Commentaries, Sharswood 1896, Vol. II, Book III, Chap. 23, Trial By Jury, p. 376 25

Cohen "Negligence Law in Europe", 361 Insurance Law Journal 82 (Feb. 1953) 17

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International Conference on Private Air Law, The Hague, September 1955 reported in ICAO Document 7687-LC/140 "Hague Minutes" 29, 33, 41, 44, 49, 58, 59, 60, 61, 96, 98, 99

Legal Committee of ICAO (Ninth Session), Rio de Janeiro, August 25-September 12, 1953, reported in Document 7450-LC/136 "Rio Minutes" 30, 36, 38, 39, 40, 47, 48, 49, 51, 53, 57, 94, 95

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World Airline Record, 6th Edition, 1965 pub. by Roadcap & Associates, Chicago, Ill. 28, 30, 46

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BRIEF OF ARNOLD HOLTZMAN AS *AMICUS CURIAE*

Nature of the Interest of *Amicus* Arnold Holtzman

Amicus Arnold Holtzman's motion for leave to file this brief *amicus curiae* was granted by this Court, on the grounds that he now has pending an action for damages in the Supreme Court of New York, County of Kings, entitled "ARNOLD HOLTZMAN, Plaintiff —v— BRITISH EUROPEAN AIRWAYS and DE HAVILLAND, Defendants," being Index No. 7840/1963 on the Docket of said Court, in which the question involved is the same as that presented for decision in the instant case, namely—are the limitation of liability provisions contained in Article 22(1) of the Warsaw Convention (49 Stat. 3000-3026), available to an air carrier of a passenger receiving bodily injuries on a flight in international transportation in light of the provisions of Article 3(2) of the Convention (49 Stat. 3015) precluding

availability of various provisions of the Convention limiting liability where the purported ticket contains, on the front thereof in exceedingly small print, the message, "Each passenger should carefully examine this ticket, particularly the Conditions on page 4," and the "notice" to the passengers is located on page 4 of a ticket and baggage checks combined in the form of a small booklet and (to quote the two courts below), is contained in footnotes printed "in microscopic type" and "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' ", and the "exculpatory statements . . . are virtually invisible . . . are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else," and " 'are so artfully camouflaged that their presence is concealed' "? *Amicus* Holtzman states that the ticket "delivered" to him by British European Airways, on the international flight on which he sustained severe and permanent bodily injuries, is identical, as to its pertinent parts, printing, typography and legibility, to the ticket delivered to the respondents in the instant case.

More specifically, *amicus* Holtzman was a passenger on a de Havilland aircraft operated by British European Airways which crashed and burned at Ankara, Turkey, on December 21, 1961. *Amicus* Holtzman was trapped in the flames, and according to paragraph 6(a) of the verified bill of particulars which he filed in said action,

> "As a result of the accident plaintiff Arnold Holtzman suffered pulmonary burns necessitating an emergency tracheotomy; plaintiff suffered burns covering an area of 20% of the total body area including the following: third degree burns involving the entire forehead and eyebrows, extending into the eyelids, downward around the upper part of the left cheek and across the glabellar region of the nose. The lower

portions of the nose, upper lip, lower lip, cheek and naterior portions of the neck were deeply burned. Scattered areas of third degree loss in the area of the ears involving the helical rims of the ears causing a loss of a portion of the area involved. Second degree burns in the scalp. Deep and extensive third degree burns of both hands. Said burns resulted in many operative procedures to repair and reconstruct the destroyed areas of skin of the face, forehead, ears and hands. The permanent injuries are the results of the healing scars and the attempts at reconstruction which have resulted in permanent disfigurement of the plaintiff."

An additional ground of the motion of *amicus* Holtzman for leave to file this brief was that there are many other cases, now pending in various state and federal courts, involving identical tickets "delivered" to passengers who were killed or suffered severe bodily injury in international flight air crashes or accidents, in which the Warsaw Convention is being attempted to be used as a defense, among them being the following captioned cases in which the plaintiffs are represented by *amicus* Holtzman's counsel Stuart M. Speiser: *Volney Righter, etc.* v. *American Air Lines, et al.*, Supreme Court, County of New York, Index No. 11487/64; *Reiger* v. *Pan American, et al.*, Supreme Court, County of New York, Index No. 13252/66; *Byzinski* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 6747/65; *Rygaard* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9722/65; *Harrison* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9723/65; *Graham* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index No. 9718/65; *Zuckerman* v. *Eastern Air Lines, et al.*, Supreme Court, County of New York, Index

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Amicus Holtzman further stated in his motion for leave to file this brief, that he has attempted to present his views to this Court, by and through his present counsel, as to the invalidity of the purported "withdrawal" of the Government of the United States of its earlier denunciation of the Warsaw Convention, in the case of Arnold Holtzman, Petitioner, v. Dean Rusk, Secretary of State, Respondent, Case No. 1294 on the Docket of this Court for the October, 1965, Term; petition for writ of certiorari was denied May 16, 1966, reported in 384 U. S. 943, 16 L. ed. 2d 541, 86 Sup. Ct. 1466.

Amicus Holtzman supports the position of the respondents herein, and respectfully urges this Honorable Court to affirm the decisions of the courts below.

The Question Involved

Is the liability of an air carrier to a passenger limited to $8,291,87 under the Warsaw Convention, when the only ticket reference to the possible applicability of the Warsaw Convention is the following: a message on the front of a ticket, in exceedingly small print, stating "Each passenger

should carefully examine this ticket, particularly the Conditions on page 4"; and, on said page 4, contained in footnotes printed in microscopic type and camouflaged in Lilliputian print in a thicket of "Conditions of Contract," the exculpatory statements are virtually invisible, are ineffectively positioned, diminutively sized, unemphasized by bold face type, contrasting color or anything else, and are so artfully camouflaged that their presence is concealed?

ARGUMENT

I.

The Second Circuit Considered All of the Legal Arguments Now Being Advanced on Behalf of Petitioner Alitalia, and Rejected All of Them for Sound Legal Reasons.

The carefully considered opinion of the Second Circuit makes it clear that all legal arguments contained in the briefs submitted in support of petitioner Alitalia in this Court have already been rejected, for sound legal reasons. Therefore, *amicus* Holtzman will make only brief mention of these legal arguments herein, so as not to duplicate the brief of respondent Lisi. The main thrust of this Holtzman *amicus* brief will be directed against non-legal arguments and innuendos raised by the briefs of other *amici*, as detailed in Point II below.

The Court of Appeals specifically rejected Alitalia's contention that, under Article 3(2), all that was required was that a ticket be delivered to passengers, the rejected argument being based upon a strict literal construction of the Convention and a sought-for application of the principle *expressio unius est exclusio alterius* (Appendix, pp. 93a, 94a). The Court below rejoined (Appendix, p. 94A):

"It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Frankfurter stated it, a 'verbal prison.' *Sullivan* v. *Behimer*, 363 U.S. 335, 358 (1960) (Frankfurter, *J.*, dissenting). The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, 'words are such temperamental beings that the surest way to lose their essence is to take them at their face.' 1942 Address by Judge Hand to the Massachusetts Bar Association. Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra.*"

The reference to the *Eck* case is to the same court's opinion in *Eck* v. *United Arab Airlines* (1966, CA2), 360 F2d 804. The Court further fortified its rejection of this medieval rigidity by references to its own earlier opinion in *Mertens v. Flying Tiger Line, Inc.* (1965, CA2), 341 F2d 851, cert den 382 U.S. 816, and to that of the Ninth Circuit in *Warren* v. *Flying Tiger Line, Inc.* (1965, CA9), 352 F2d 494, (Appendix pp. 94a, 95a), pointedly adding (Appendix, pp. 96a, 97a):

"We believe that the reasoning of the *Mertens* and *Warren* decisions is apposite to the case now before us. The Convention's arbitrary limitations on liability —which have been severely and repeatedly criticized —are advantageous to the carrier. But the *quid pro quo* for this one-sided-advantage is delivery to the passenger of a ticket and baggage check which give him

notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled domestically, the amount they may recover in the event of an accident is drastically reduced. In short, it is clear from the *ratio decidendi* of the *Mertens* and *Warren* cases, that the inquiry that must be made if the Convention's Articles are to be given meaning, is 'whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures. . . .' *Mertens* v. *Flying Tiger Line, Inc., supra* at 857."

The very recent *Egan* case from the New York Court of Appeals, a fully considered unanimous decision discussed in detail below, Point VI, completely adopts and supports the position of the Second Circuit. The reasoning and conclusion are also consistent with previous decisions of this Court supporting the proposition that if alternative meanings can be placed upon a treaty, the meaning should be adopted, if possible, that is least restrictive of the rights of individuals. As the Supreme Judicial Court of Massachusetts said in *Universal Adjustment Corp.* v. *Midland Bank, Ltd.* (1933), 281 Mass. 303, 184 N.E. 152, 87 A.L.R.

1407, at page 1422: "When a treaty provision admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred. *Akasura* v. *Seattle*, 265 U.S. 332, 44 S. Ct. 515, 68 L. ed. 1041; *Tucker* v. *Alexandroff* [183 U.S. 424, 437, 22 S. Ct. 195, 46 L. ed. 264], *supra*; *Geofroy* v. *Riggs* [133 U.S. 258, 271, 10 S. Ct. 295, 33 L. ed. 642], *supra*."

As to whether the particular tickets (and baggage checks) here involved gave adequate notice, the Court found them completely wanting (Appendix, page 98a):

> "We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice. On the front of the ticket and baggage check, in exceedingly small print, was the following message: 'Each passenger should carefully examine this ticket, particularly the Conditions on page 4.' And, at this point, we note that one of our reasons in *Mertens* v. *Flying Tiger Line, Inc.*, *supra*, for precluding the carrier from limiting its liability under the Convention was that the required statement on the ticket 'was printed in such a manner as to virtually be unnoticeable and unreadable . . .' *Id.* at 857.
>
> Judge MacMahon appropriately characterized the 'notice' to the passenger in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of "Conditions of Contract." . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that their presence is concealed.'"

The petitioner Alitalia makes the belated after-thought plea that the question was one for a jury. Both courts below, the trial court (Appendix, page 76a), and the Court of Appeals (Appendix, page 100a) specifically held that a jury could not have reasonably found that the tickets and baggage checks gave the passengers the required notice. When respondents moved for partial summary judgment, petitioner submitted affidavits in opposition (Appendix, pages 72a, 73a) and "All the evidentiary facts material to the motion appear on the face of the tickets issued to the passengers on the flight involved, and there is no dispute about them" (Appendix, page 73a). Furthermore, counsel for *amicus* Holtzman was present at the argument of these cases on appeal before the Second Circuit, and heard Judge Kaufman ask George Tompkins, Esquire, counsel for petitioner Alitalia, from the Bench during the oral argument whether petitioner Alitalia claimed that there was any jury issue; and Mr. Tompkins answered in the negative. And the *Egan* case, discussed below, Point VI, shows that no factual or jury issue is here involved since reasonable men could not possibly differ on the question.

Virtually all counsel supporting the position of petitioner Alitalia have made a reference to the last part of a sentence in footnote 64 on page 512 of an article in 80 Harvard Law Review, by two attorneys employed in 1966 by the United States Department of State, Andreas F. Lowenfeld and Allan F. Mendelsohn. But as the authors pointedly remarked in an asterisk footnote on page 497 of this article, "The views expressed herein are those of the authors and not necessarily those of the United States Government or the Department of State." The part of the footnote sentence repeated by opposing counsel states, without any citation of *any* precedents to support the re-

mark, that the trial judge herein, in *Lisi*, "was breaking a chain of hundreds of precedents". Those same opposing briefs, however, fail to state the *text* on page 512 to which the footnote 64 was appended, appearing on pages 512, 513 of the article—"As to notice, it was hard to get away from the airlines' standard form * * * [referring to form of ticket on a facing page]. Even if the passenger could read the ticket, he would hunt in vain for warning of the liability limit. The United States Government had sought at the Hague to have the warning made more specific and in letters at least one-half centimeter higher, but these efforts had failed." Furthermore, neither the authors of the Harvard article nor the briefs supporting petitioner herein have pointed out where one may find a list of these hundreds of precedents, nor the citations of any of them.

II.

Claims in Briefs of Other *Amici* That the Decision Below Compromises the Good Faith of the United States in Relations With Other Nations, and May Lead to Erosion of the Warsaw Convention, Are Entirely Unfounded. The Warsaw Convention Has Outlived Its Time Only Because of Misrepresentation of Its True Nature. There Is No Legal, Moral or Economic Justification for Warsaw Today. The Arguments Made Herein Against the Decision Below Tacitly Admit That Warsaw Cannot Survive if Reasonable Notice of Its Limitations Is Required.

Shortly after the end of World War II, it became apparent that international airlines no longer needed the extraordinary subsidy involved in limiting passenger liability to $8,300, and that the United States, whose citizens make up the great majority of the victims, would not stand for it

much longer. There then began a series of conferences and considerations of the Warsaw Convention problem, which are described in more detail in Points III, IV and V below. Throughout these conferences, the true purposes and nature of Warsaw have been misrepresented consistently by its proponents, and therefore it is no surprise to see this misrepresentation continued right into the *amici* briefs supporting petitioner in this case. The purpose of this Point II is to deal directly with these misrepresentations, and to point out the true nature and purposes of Warsaw.

Warsaw's proponents have attempted to prolong its life by making vague claims that its limited liability is an economic necessity; that it confers benefits upon passengers; that it brings about uniformity and lessens litigation; and that it contains important provisions and has important purposes other than the limitation of carrier's liability, such as a uniform ticketing regime which would not be possible without the Convention. These claims are discussed below in the remaining sections of this Point II, against the background of the same old vague claims and innuendos, such as the statement on page 10 of the brief of *amicus* United Kingdom, that "a decision of this Court upholding the judgments below would imperil the limitation provisions of the Montreal agreement"; and the claimed "effect of the decision below in compromising the good faith and integrity of the United States in its relations with other nations" found at page 8 of the first brief submitted by *amicus* A.T.A. (attached to its motion of March 31, 1967 for leave to file brief amicus curiae on the petition for certiorari). As will be apparent after reading the material below, the true gravamen of the aforementioned claim of *amicus* United Kingdom is that Warsaw is so unfair and anachronistic that the mere requirement of reasonable notice of its provisions is enough to imperil its existence.

a. ***There Is Absolutely No Economic Justification Today for Warsaw Limitations. Total Passenger and Cargo Liability Insurance Costs for U.S. Airlines Are Less Than One Percent (1%) of Operating Costs, With or Without Warsaw Limitations. The Other 99% of Operating Costs Are Not Limited by Treaty, and Are Readily Paid, Often at American Prices, by Foreign Airlines Eager to Serve the Lush U.S. Air Travel Market. The C.A.B. Has Found That the Impact of Complete Denunciation of Warsaw Would Be Minimal.***

For several decades, proponents of Warsaw have claimed that elimination of the liability limitation would cause financial havoc among international airlines. *No figures of any kind were ever presented in support of this claim.* To this date, the foreign airlines, such as those operated by *amici* U.K., Italy and Canada, have never submitted any supporting figures, even though such figures have been requested by various organizations officially concerned with the Warsaw problem.

Finally, as part of a general review of Warsaw conducted by the U.S. Interagency Group on International Aviation (IGIA) in 1962, the Civil Aeronautics Board undertook a staff study to determine the economic impact of complete denunciation of Warsaw, and to study various other alternatives. The C.A.B. staff reached the conclusion that "*The increase in insurance cost to the carriers, in the event they are subjected to unlimited liability as a result of U.S. withdrawal from the Warsaw Convention, would be minimal*" (IGIA document 23/1.10A, Final Action, August 7, 1962, Attachment D, page 1).

This conclusion is amply supported by reference to the most recent figures which counsel for *amicus* Holtzman has been able to find in the public files of the C.A.B. Set forth below are excerpts from C.A.B. Forms 41 required to be

filed with the C.A.B. by U.S. air carriers for the year ending December 31, 1966, of which *amicus* Holtzman respectfully requests this Court to take judicial notice. These figures show total operating expenses, insurance costs and passenger-cargo liability insurance cost as a percentage of total operating expenses, for the two largest all-domestic air carriers (United Airlines and American Airlines), and various divisions of the largest all-international air carrier (Pan American World Airways). Column A shows total operating expenses; column B shows cost of purchased public liability and property damage and all other general insurance except insurance covering liability for injuries, loss and damage to passengers and cargo, combined with provision for self-insurance against general risks (generalized as "non-passenger insurance"); column C shows cost of purchased insurance and provisions for self-insurance covering liability for injuries, loss and damage to passengers and cargo (generalized as "passenger-cargo insurance"); and column D shows passenger-cargo insurance as a percentage of total operating expenses.

Carrier	A Total operating expenses	B Cost of non-passenger insurance	C Cost of passenger-cargo insurance	D Passenger-cargo insurance as percentage of total operating expenses
United Airlines	$781,866,883	$5,607,896	$5,194,537	.00664
American Airlines	$621,000,000	$6,907,687	$4,524,682	.00728
Pan American, Pacific Division	$229,510,686	$2,110,580	$2,217,883	.00966
Pan American, Latin American Division	$182,892,997	$1,701,804	$1,153,515	.00636
Pan American, Atlantic Division	$295,906,060	$2,519,486	$2,089,245	.00702

Several interesting conclusions may be drawn from these figures:

1. Pan American, protected by Warsaw limitations as to most of its passenger claims, and operating entirely on international flights, had a higher passenger-cargo insurance cost (percentage-wise) than either of the two domestic airlines, who are *not* protected by Warsaw as to most passenger claims.

2. In four out of five instances, the cost of non-passenger insurance (not protected by any treaty) was greater than the cost of passenger-cargo insurance.

3. In any event, the total cost of passenger-cargo insurance, with or without Warsaw protection, is well under one percent (1%) of total operating costs.

What of the other 99% of operating costs, which cover such items as advertising, ticket sales, flight crew and ground maintenance labor costs, fuel, legal fees, and equipment depreciation? Clearly, none of these costs are limited by any international treaties. Yet, they are readily assumed by dozens of foreign airlines who compete energetically for a share of the U.S. international passenger market, the largest and most lucrative in the world. Indeed, many of these costs are necessarily paid at American prices in American dollars, since it is not possible to operate air services in the U.S.A. without having extensive personnel and equipment stationed here, and without extensive advertising and sales costs. In fact, it is well known that the Boeing and Douglas jet aircraft, manufactured in the United States, carry most of the world's international passengers, so that even equipment costs are mainly incurred at American prices. But in the scramble to pay these 99% of operating costs at prices much higher than those prevailing at

home, the foreign carriers cling to the one area protected by treaty, and seek to save a minute fraction of the less than one percent involved in passenger insurance, by continuing an archaic subsidy conferred on them at the expense of widows, orphans and cripples whose lives are shattered by air disasters.

Even in the claims area, foreign airlines readily accept American standards in many operations. For example, they must carry workmen's compensation insurance on thousands of their employes stationed in the U.S.A., and must carry liability insurance at standard rates on all their U.S.A. ground operations, since none of these areas are protected by treaty or subsidized by accident victims. Thus, the airlines operated by *amici* United Kingdom, Italy and Canada must pay full damages if they injure or kill Americans who may be strangers to them, through negligent operation of ground vehicles or negligent maintenance of ticket office premises; but as to Americans who patronize these airlines as passengers, they seek treaty protection and limitation of liability to a fraction of the actual damage!

This is the true economic perspective of the Warsaw Convention. The sole purpose of this treaty was to limit liability and to confer a subsidy on the carriers at the expense of those passengers least able to afford it—the ones who do not make it safely to their destinations. Probably the most complete answer to the groundless economic claims of Warsaw's proponents is the U.S. domestic airline system, which has developed into the largest, safest and most profitable in the world, without benefit of any specially enacted liability limitations.

b. ***The Warsaw Convention Confers No Benefits Upon Passengers—It Merely Takes Away Legal Rights They Would Otherwise Have. Its Sole Purpose Was to Limit Carrier Liability. All Ticketing and Documentation Procedures Developed Through Warsaw Are Also Available to Non-Warsaw Signatories Through I.A.T.A.***

When it became apparent after World War II that international air transport no longer needed special protection, the airlines and others interested in preserving the special economic advantages of limited liability attempted to portray the Warsaw Convention as a great boon to the traveling public. Various claims were made as to broadened legal rights obtained by passengers, despite the admitted original purposes of the Convention to benefit the airlines at the expense of the passengers. These claims are refuted by a cursory inspection of the reported American cases.

Apologists for the Warsaw Convention frequently claim that it protects American passengers from even harsher limitations of foreign laws, but the Courts have held that the Convention is a ceiling and not a floor. It does not create an independent cause of action but merely limits whatever greater rights the passenger may have under other applicable laws (*Noel* v. *Linea Aeropostal Venezolana*, 247 F. 2d 667).

In the same category, supporters of Warsaw make the general claim that the Convention protects American citizens who sue foreign airlines in foreign courts. Aside from the above refutation of the "floor" argument, it is important to note that there have been no reported cases of American passengers suing foreign airlines in foreign courts. Practically all of the world's international carriers do business in the United States and thus are amenable to suit here.

It is also sometimes claimed that the Convention gives the passenger a broader choice of venue for bringing suit, whereas the opposite is true. Since the Convention does not create a new cause of action, it is necessary to make personal service of process upon the carrier in accordance with local law. Article 28 further limits venue to four places: the carrier's domicile, its principal place of business, the place where the contract was made, or the destination. There are no such venue limitations in the local laws of our states, so that it is quite possible to have a Warsaw Convention case dismissed for improper venue or lack of jurisdiction, when the same case could have been maintained against the carrier without the Warsaw Convention (see *Berner* v. *United Airlines, et al.*, 149 N. Y. S. 2d 335; *Winsor* v. *United Air Lines*, 153 F. Supp. 244).

So far as the burden of proof is concerned, the Convention does no more than codify the rule of *res ipsa loquitur*, which exists in our state laws independant of the Convention. [For a collection of the State cases, see 6 ALR 2d 528].

In the civil law countries, there is actually a stronger presumption of negligence than res ipsa loquitur, without the Warsaw Convention. A typical provision is: "Every act whatever of an individual which causes injury to another obliges the one, because of whom it has occurred, to make up for it". [see Cohen, "Negligence Law in Europe", 361 Insurance Law Journal 82 (Feb. 1953)].

In suits brought in the United States for injuries or deaths occurring in foreign countries, when the Warsaw Convention is not involved, there is ample protection for the passenger in American law. American courts would not even have to consider the full faith and credit clause, which was involved in such cases as *Kilberg* v *Northeast Airlines, Inc.* (1961) 9 NY2d 34, 211 NYS2d 133, 172 NE2d

526; and *Pearson* v *Northeast Airlines, Inc.* (1962, CA2 NY), 309 F2d 553, 92 ALR2d 1162, certiorari denied in (1953) 372 U.S. 912, 9 L ed 720, 83 S Ct 726. Harsh foreign limitations could be disregarded under established American precedents; see *11 Am Jur, Conflict of Laws,* §6; *Loughran* v *Loughran* (1934) 292 US 216, 78 L ed 1219, 54 S Ct 684, rehearing denied in 292 US 615, 78 L ed 1474, 54 S Ct 861; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.* (1934) 292 US 143, 78 L ed 1178, 54 S Ct 634, 92 ALR 928, rehearing denied in 292 US 607, 78 L ed 1468, 54 S Ct 772; *Coster* v *Coster* (1943) 289 NY 438, 46 NE2d 509, 146 ALR 702; *Masci* v *Young* (1932) 109 NJL 453, 162 A 623, 83 ALR 869, affirmed in *Young* v *Masci* (1933) 289 US 253, 77 L ed 1158, 53 S Ct 599, 88 ALR 170; *Dougherty* v *American McKenna Process Co.* (1912) 255 Ill 369, 99 NE 619, LRA 1915 F 955, Ann Cas 1913 D 568; *Usher* v *West Jersey R. Co.* 126 Pa 206; *Nat. Bank* v *Shaw,* 109 Tenn 237.

The C.A.B. Staff Study made for the IGIA consideration of Warsaw in 1962 concluded that the "existing regime of tort liability to which the carriers are now subject and for which they already have insurance" is adequate protection for the American domestic passenger (IGIA document —23/1.10A, Final Action, August 7, 1962, Attachment D, p. 8).

Warsaw apologists have often attempted to convey the false impression that the liability limitation is only one small part of the Warsaw scheme, and that it also includes a complicated and valuable system of ticketing and documentation, without which the processing of international flights would be seriously hampered. Examination of the Convention reveals nothing of substance other than the liability limitation and supporting procedures. In practice, there are many major nations which have never ad-

hered to Warsaw (e.g., Chile, Turkey), but which have always used the common international ticketing and documentation system. The plain truth is that this system is a product of the International Air Transport Association rather than Warsaw. Appendix B of the ATA-IATA *amici* brief shows that the airlines of Chile, Turkey and other non-Warsaw nations are members of IATA.

c. *Warsaw Does Not Reduce Litigation or Bring Uniformity of Law. By Injecting the Irritants of Arbitrary Limitations and Foreign Legal Concepts Into Normal Litigation Channels, It Actually Foments Protracted Litigation and Destroys Uniformity.*

Another claimed benefit of Warsaw is that it brings about "uniformity" in the administration of justice. Admittedly, Warsaw's objective is to be uniformly unjust to all its victims by limiting all recoveries to a fraction of the actual damage suffered. However, even within this narrow sphere Warsaw has not brought uniformity. Because of the many legal technicalities arising even under the old Warsaw Convention itself (without considering further complications caused by Hague and Montreal), the C.A.B. found in 1962 that only 53% of the claims against U.S. flag (overseas) airlines came under the Warsaw Convention during the period 1950-1960, leaving some 47% of such claims to be governed by other laws (IGIA document 23/1.10A, Final Action, August 7, 1962, Attachment A, p. 9). Furthermore, the most ludicrous instances of non-uniformity arise under Warsaw, for many times passengers seated right next to each other, even on flights within the United States, are governed by different laws because of Warsaw. The applicability of Warsaw depends upon the stops listed in the ticket of each passenger, rather than upon the place of accident or his immediate destination on the crash flight. In many accidents occurring on

our domestic airlines, there are some passenger claims limited by Warsaw and some which are not limited at all. Therefore, even the crude attempt at uniformity through denial of compensation has been ineffective.

If one were seeking to disrupt the natural forces of tort litigation, prevent reasonable settlements and thus foment protracted litigation, one would have to search hard for a better way to do this than to attempt to limit liability in aviation accidents. In this field, we have the combination of the highest earning power of victims, and the most serious and deadly injuries which are an inevitable result of the speed and destructive power of modern aircraft. Therefore, to limit liability in this field is to create such disparity between real damage and compensation as to give the plaintiff practically nothing to lose and everything to gain by litigating rather than settling. Because of this factor and because of the difficulties of interpretation which are to be multiplied by Hague-Montreal, our courts are now jammed with dozens, perhaps hundreds, of Warsaw cases which would otherwise have been disposed of years ago. An example is the litigation arising out of the Air France Paris crash of 1962, in which the claims for the deaths of 62 passengers are being litigated in the U.S. District Court, Northern District of Georgia. The opinion in Block et al. v. Compagnie Nationale Air France (Nov. 8, 1967) —— F 2d ——, 1967 CCH Neg Cases, p. 2307, which took the Fifth Circuit panel more than two years to write, deals with only one obscure provision of Warsaw, but it is a striking illustration of the obstructive nature of Warsaw when injected into the American legal system.

With the addition of the Hague protocol (as to some Warsaw signatories but not to others) and the Montreal agreement (as to some airlines but not others), it is difficult if not impossible even for aviation law specialists to

predict what law would apply to many international passengers today. Yet, in the face of this hopeless complication, the *amici* supporting petitioner, and the other international air carriers seek to avoid giving passengers adequate notice of Warsaw even today.

Warsaw brings further complication to litigation by creating the atmosphere for joining of non-carrier defendants, such as aircraft manufacturers, repair agencies and airport operators, none of which can claim the liability limitation. The more defendants, the more difficult ordinary settlement and litigation procedures become, particularly when the non-carrier defendants do not consider themselves primarily or even substantially liable, and feel that they have been joined only because the plaintiff can recover so little from the airline.

d. *Carriers and Insurers Who Claim That Warsaw's Liability Limitations Are Necessary, Use American Courts to Litigate Huge Hull Claims Which Dwarf Passenger Suits, and Which Are Not Limited by Any Treaty.*

Another argument made by Warsaw proponents is that airline passenger liability claims represent a catastrophic risk, which must be limited in amount, and which are not appropriate for ordinary damage litigation in U. S. courts. This argument is largely self-refuting in that we have always had the example of domestic passenger claim litigation, which has never been limited, is fully covered by liability insurance, and has successfully been accommodated by our American legal system without financial damage to the airline industry.

Moreover, this contention has lost all semblance of reason with the postwar advent of larger aircraft. In the jet airliner accident today, the damage claims for loss of the

aircraft hull usually run to more than five or six million dollars, and thus dwarf the amounts paid out on passenger claims.

There is a great deal of litigation in this country between airlines and aircraft manufacturers, in which the insurance company which paid the hull claims on a crashed airliner is actually suing the products liability insurer of the manufacturer. There are other suits pitting airline against airline, seeking to recover millions of dollars in hull claims caused by collisions. In some of these cases, the passengers on these crashed airliners are limited to $8,300 in claims by the Warsaw Convention, and yet the airline is free to sue for millions of dollars in property damage arising from the same accident! Thus, the airlines and insurers who support Warsaw's limitations against passengers, are not concerned over catastrophic claims and the imperfections of the American legal system, when it comes to litigation of their own claims against each other.

An example of this type of litigation is the case of *Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, U.S. District Court, Southern District of New York, several preliminary phases of which are unofficially reported at 7 Avi. 18,114 and 8 Avi. 18,255 (CCH Aviation cases). There, Braniff Airways seeks to recover $3,750,000 damages for loss of a DC-7C airplane which crashed in Florida on March 25, 1958, claiming that the defendant supplied defective engines which caused the crash. A number of passenger cases arising out of the same accident were governed by the Warsaw convention, but this has not deterred Braniff's hull insurer (a Lloyds' of London group) from suing the manufacturer (insured by another Lloyd's group) for over three million dollars. Soon, we shall see such claims in the area of ten to twenty million dollars per hull, when the "jumbo jets" and supersonic aircraft are

activated. It should be noted that the insurance cost figures set forth in section "a" of this Point II show that even in this early stage of the jet era, passenger-cargo liability insurance costs the airlines less than their hull and other types of insurance.

e. Warsaw Is Admitted by Its Strongest Proponents to Be "Completely Repugnant" to American Law. The Only Reported Decision Upholding Its Constitutionality Under the Seventh Amendment Rests on the Untenable Ground that the Right to Trial by Jury Does Not Include Assessment of Damages.

A strong insight into the real opinion of Warsaw held by its strongest proponents can be obtained from the minutes of the International Union of Aviation Insurers, which are published in the Appendix of the U. S. Senate Hearings on the Insurance Industry, Sen. Res. 231, 85th Cong., Aug. 6-15, 1958, at pp. 487-675. An example is the following quotation from page 497, referring to a statement of the American insurer's position on Warsaw by George G. Orr, director of claims for U. S. Aviation Underwriters, one of the two largest American aviation insurance groups:

> "As to the revision of the Warsaw Convention, he wanted to make the American position clear. American insurers had had plenty of experience of dealing with the Convention and were fully alive to its defects, but generally speaking, it had enabled settlements to be made at lower figures than the average for non-Convention cases and its validity had been upheld and affirmed by the American Courts in a series of cases. There were three dangers about revision. The first was that although revision would no doubt cure some of the defects, it might introduce new ones. In the second place, *there was quite a serious danger that*

a revised Convention might not be ratified by the American Senate, since the Convention contained several principles which were completely repugnant to American law and the original Convention owed its easy passage through the Senate to the exceptionally wide powers exercised by President Roosevelt at that time. Finally, even if the revised Convention were passed, it would necessitate fighting a series of actions in the Courts to establish its validity and the existing decisions would be rendered valueless." (Emphasis supplied.)

In the 38 years since the drafting of the Warsaw Convention, and the 33 years since the United States adherence, there has been only one written court opinion on the constitutionality of the Convention under the Seventh Amendment, which guarantees the right to trial by jury in civil cases involving more than $20.

The Convention was attacked under the Seventh Amendment in *Pierre* v. *Eastern Airlines et al.* (1957), 152 F. Supp. 486, in the U.S. District Court for the District of New Jersey. Counsel for *amicus* Holtzman was one of the counsel for the plaintiff, and knows that the question was very carefully briefed by both sides. In addition, the United States of America intervened in order to defend the constitutionality of the Convention, and government attorneys were granted delays of several months to prepare their briefs. Appearances were entered by the local United States Attorney, by an Attorney from the Justice Department in Washington, and by two legal advisers to the State Department from Washington.

After this thorough briefing and argument, the Court was able to declare the Warsaw Convention constitutional *only* by holding that the right to trial by jury relates solely

to liability, and does not cover the assessment of damages. It is patent from a reading of the Court's opinion that if the assessment of damages was considered part of the right to trial by jury under the Seventh Amendment, that the Warsaw Convention would be unconstitutional, since, in the words of the Court, "No treaty may authorize what the Constitution forbids. *Geofroy* v. *Riggs*, 133 U.S. 258."

The Court in the *Pierre* case did not cite a single precedent for the holding that jury trial does not include the right to fixing of damages, even though dealing with a subject hundreds of years old.

There is, of course, ample authority for the basic principle that the constitutional right to trial by jury includes assessment of damages; see *Dimick* v. *Schiedt* (1935), 293 U.S. 474, at p. 486, 79 L ed 603, 611, 55 S Ct 296, 95 ALR 1150; *Smyth Sales* v. *Petroleum Heat & Power Co.* (1944, CA 3), 141 F.2d 41 at p. 44; Blackstone's Commentaries, Sharswood 1896, Vol. II, Book III, Chap. 23, Trial by Jury, p. 376.

The *Pierre* case was settled above the Warsaw Convention limits, so that the appellate courts had no opportunity to rule upon the emasculation of the right to jury trial which was found necessary to support constitutionality. Counsel for *amicus* Holtzman has attempted to raise these constitutional issues in other Warsaw cases, including *Eck* v. *United Arab Airlines, Inc.* (1964), 15 NY2d 53, 255 NYS2d 249, 203 NE2d 640, 6 ALR3d 1260, but the decisions to date have been based on other grounds.

f. *U.S. Adherence to Warsaw Has No Effect on Operating Rights to Foreign Countries.*

Warsaw apologists frequently imply that if the U.S. denounced Warsaw, or if American courts did not fully

support Warsaw's carrier subsidy at the expense of accident victims, the operating rights of American carriers into foreign countries might be jeopardized. This argument has never been supported by the Department of State, for the simple reason that operating rights are a matter of reciprocity. If *amicus* Italy became angry at the final result in *Lisi,* and decided to revoke the operating rights of American carriers into Rome, she would be losing her own lucrative rights to New York, and her share of the American market which is critical to the financial survival of her international airlines.

g. Anachronistic Limitations on Wrongful Death Recoveries in a Few American States, Cited as a Parallel to Warsaw, Are on the Way Out; Are Being Circumvented in Many Aviation Cases; Are Subject to State Legislative Control; and in Any Event Cannot and Do Not Apply to Personal Injury Cases Such as Lisi.

Warsaw proponents frequently argue that Warsaw does little more than parallel the limitations on recovery which may be found in wrongful death statutes of a number of our own states.

This argument would set our legal standards at the lowest level of our public morality. It is true that there are still twelve states which have monetary limitations on recovery for wrongful death. However, the entire trend in the past quarter-century has been away from this 19th Century railroad-inspired attempt to cheapen human life. A review of the early wrongful death cases reveals that most of them were brought against railroads, and it is evident that the damage limitations were enacted by railroad-controlled legislatures (see *DeSoto Motor Corp.* v. *Stewart,* 62 F. 2d 914; *Poff* v. *New England T & T Co.,* 72 N.H. 164, 55 Atl. 891; *Speiser, Recovery For Wrongful Death* (1966), pp. 489-494.)

Every one of these states has raised its limitations substantially in recent years; and rarely does a session of their legislatures go by without the introduction of a bill to remove all limitations. Many other states which had such limitations have removed them completely in the past two decades. All of our federal legislation touching upon such claims has been enacted without limitations (e.g., Federal Employers Liability Act, Federal Tort Claims Act, Death on the High Seas Act.) Some of our states have constitutional prohibitions against such limitations. Furthermore, the Warsaw Convention limits recoveries not only in death cases but in personal injury cases as well. This our state legislatures could not constitutionally do even if they were so inclined.

Such decisions as *Kilberg* v. *Northeast Airlines, Inc.* (1961), 9 NY2d 34, 211 NYS2d 133, 172 NE2d 526, and *Pearson* v. *Northeast Airlines, Inc.* (1962, CA2 NY), 309 F.2d 553, 92 ALR2d 1162, certiorari denied in (1963) 372 US 912, 9 L ed 2d 720, 83 S Ct 726, have pointed the way to circumvention of these harsh limitations in the more enlightened majority of jurisdictions which have no such limits. The non-limit jurisdictions coincide generally with the large population centers such as New York, California, Illinois, Texas and Florida, where most aviation accident litigation takes place. For further discussion of this point, see *Speiser, Recovery for Wrongful Death* (1966), pp. 721-742.

III.

The *Amici* United Kingdom, Italy and Canada Are Owners or Controllers of International Air Carriers. Their Position on the Warsaw Convention Should Be Considered in That Light.

a. *In General*

Since they appear by leave of this Court, the *amici* foreign governments—United Kingdom, Republic of Italy and Canada—have the right to present their arguments in favor of petitioner's position. But, as *amicus* on behalf of a concededly interested person, Holtzman, we wish to point out that these *amici* governments do not occupy the impartial position of uninvolved sovereign, as does the Government of the United States. These *amici* are all owners, or principal stockholders, of international air carriers and have a definite financial and pecuniary interest in the provisions of the Warsaw Convention limiting the amounts recoverable for the injury or death of passengers on international air flights. They are as "disinterested" as IATA, or as would be Pan American Airways or Trans World Airlines.

Ever since the "Brandeis brief" submitted to this Court in 1908 in *Muller* v. *Oregon,* 208 US 412, 52 L ed 551, 28 S Ct 324, this Court has taken judicial notice of economic facts of general knowledge. We ask it to do so in this case, with respect to the total or controlling ownership of international air carriers. These facts are known to the world; and are undisputed. Reference is hereinafter made to the facts stated in the "World Airline Record," 6th Edition of 1965, known as the "standard reference of the industry," and published by Roadcap & Associates, 327 South

La Salle Street, Chicago 4, Illinois (hereinafter referred to, by page, as "World Airline").

The positions taken by various governments at international conferences concerning international private air law, held between 1929 and 1966, throw considerable light not only on the purpose and meaning of provisions of the Warsaw Convention and of the Hague Protocol, but also on the attitude and position of such governments with respect to the relative rights, duties, and liabilities of international air carriers, of international air carrier passengers and their baggage, and of internationally carried air cargo. These include international conferences on private air law, meetings of the Legal Committee of ICAO—the presently existing International Civil Aviation Organization—and meetings of ICAO itself. These various international conferences and meetings were all reported or recorded, and the various "Minutes" or "Documents" emanating therefrom reflect the positions taken by various governments.

References are made hereinafter to: the Second International Conference of Private Air Law held at Warsaw from 4-12 October, 1928, officially reported in the French language in Document: 7838, reprinted under the authority of the Secretary General of what was then "OACI" with the authorization of the Government of Poland, and referred to throughout this brief as "Warsaw Minutes"; the International Conference on Private Air Law held at The Hague in September, 1955, reported in ICAO Document 7686—LC/140, and referred to hereinafter throughout as "Hague Minutes"; to Volume II of the Hague Conference of 1955, same document number as the immediately foregoing, referred to as "Hague Documents"; the meeting of the Legal Committee of ICAO (Ninth Session) held at Rio de Janeiro from 25 August through 12 September,

1953, reported in ICAO Document 7450—LC/136, and referred to as "Rio Minutes"; and the Special ICAO Meeting on "limits for passengers under the Warsaw Convention and the Hague Protocol," held at Montreal, 1-15 February, 1966, reported in ICAO Document 8584—LC/154-1, and referred to as "Montreal Minutes."

b. *The Republic of Italy*

As to Alitalia itself, the petitioner, and the interest therein of the *amicus* Republic of Italy (hereinafter "Italy"), World Airline reports, at pages 203, 204: "Alitalia was formed on September 16, 1946, by the Italian Government and British European Airways." . . . "Under the original 1946 agreement setting up Alitalia, BEA terminated its holdings in the company in 1961 by selling its shares to the Institute for Industrial Reconstruction [an Italian governmental agency]. The Institute now holds 74.6%; other government agencies, 21.6%; and private stockholders, 3.8%." It is undisputed that Italy owns over 96% of the stock of petitioner Alitalia.

Remarks of representatives of Italy at the various international conferences and meetings on private air law, prior to the adoption of the Warsaw Convention and of the Hague Protocol, tellingly reveal that Italy was then much more concerned with the welfare of international air passengers and their families, before it became the principal owner of petitioner Alitalia.

The head of the Italian delegation at Warsaw in 1929 was Signor Giannini, Member of the Council of State and Minister Plenipotentiary. (Warsaw Minutes, page 6). Signor Giannini took a very active role in all the Warsaw meetings, debates and exchanges, and presided at the efforts of a preparatory commission charged, at the beginning of the Warsaw meetings, with the responsibility of

classification and collation of amendments to the previous CITEJA draft which had been proposed by the various delegations on behalf of their governments before the international conference was commenced (Warsaw Minutes, pages 19, 20, 22). Giannini noted that the contemplated convention (later, the Warsaw Convention) was not a fixed, immutable monument nor the law of the Medes and the Persians. He said (page 23 of Warsaw Minutes):"

> "ce que nous allons faire ici n'est qu'un premier essai de codification, un premier effort pour codifier le droit aérien. Il est évident, que si nous insérons dans la convention une clause expresse pour dire qu'il faudra la réviser, soit à des périodes déterminées, soit quand quelques Etats montreront aux autres la nécessité de faire cette révision, nous établirons dès aujourd'hui le principe que ce premier effort que nous faisons aujourd'hui n'est pas définitif.
>
> Je sais bien qu'il n'y a aucune convention définitive, je dirai même heureusement! Mais ce caractère particulier de premier effort est clairement accusé dans les propositions que j'ai signalées et je me permets d'appeler votre attention sur ce point, parce que ceci répond peut-être à la manière de voir des Délégués. Nous devrions donc considérer que, dans, la navigation aérienne, il faut commencer par poser les grandes règles générales du problème; nous faisons un premier effort et nous devons être heureux de le faire. S'il y a des améliorations à apporter, la vie ne s'arrête pas aujourd'hui, nous pourrons les faire par la suite."

This may be translated as follows:

> "what we are about to do here, is merely a first attempt at codification, a first effort to codify air law. It is evident that if we insert in the convention a

clause expressly designed to ask for a revision either at determined periods, or when a few States will show to the others the necessity for this revision, we shall, as of today, establish the principle that this, the first effort we are making today, is not definitive.

I know that there is no definitive convention, I should even say luckily! But this particular character of first effort is clearly visible in the proposals I have pointed out, and I call your attention to this point, because this may be the answer to the way of thinking of the Delegates. We should therefore consider that, in air navigation, one must begin by posing the large general rules of the problem: we are making a first effort and we must be happy to do it. If improvements can be made, life does not stop today, we can make them subsequently."

In addition to the sensible acknowledgment that the Warsaw Convention would merely be a first effort, Signor Giannini, at Warsaw in 1929, voiced Italy's then concern for international air passengers, when he made the forthright statement (Warsaw Minutes, page 32):

"La Délégation italienne tient à déclarer que, d'après sa conception, il faut qu'il y ait l'harmonie des intérêts nationaux. Dans ces conditions, quand nous nous trouvons en presence of d'intérêts organisés comme ceux des armateurs, et d'intérêts non organisés des transportés, nous considérons qu'il ne faut pas oublier ces derniers, autrement il n'y a pas cette harmonie des intérêts qu'il faut garantir.

En conséquence, commes directives générales de la Délégation italienne, je dois dire que no sommes disposés à accepter aucune mesure de faveur ou de par-

ticulière indulgence vis-à-vis des armateurs. Cela veut dire que pour ce qui est de l'intérêt de la navigation aérienne, c'est-àdire de l' intérêt national, oui; pour ce qui est privilège ou faveur, non."

The foregoing may be translated as follows:

"The Italian Delegation must state that, according to its conception, there should be harmony of the national interests. In these conditions, when we find ourselves facing organized interests like those of the ship owners and of non-organized interests, like those of the passengers, we feel that the latter should not be forgotten, otherwise we do not have the harmony of interests which must be guaranteed.

Consequently, as general directives of the Italian Delegation I must say that we are not prepared to accept any measure of favor or of particular indulgence toward the ship owners. This means that for what touches the interest of air navigation, that is of national interest, yes; for what is privilege or favor, no."

In 1955, Italy had not yet entirely abandoned its interest in the welfare of airline passengers. Its main representative at the Hague was Professor Ambrosini, who had also represented his government at Rio in 1953. According to the Hague Minutes (page 131, middle of page), he declared:

"that the Protocol should include a sanction, specifically, a private law sanction. The reason for the sanction was that the passenger ticket, being a fixed-term contract (contrat d'adhesion), the passenger had to accept it without being able to discuss the clauses set out therein. Under these circumstances, the passenber should receive notice, through a clause inserted in

the ticket, that there was a limitation of liability, that is, that there was a deviation from the general principle of law that all damage should be fully compenstated. For this reason, Mr. Drion's arguments were not valid. Mr. Drion had asked why the carrier should pay without limitation if the absence of a ticket did not by itself give rise to actual damage. The reply to this question was that the carrier should be subject to unlimited liability because he had violated the principle of public policy to the effect that the passenger should be given notice of the limitation of liability."

Although this amplifies what the Professor had earlier said in the Hague Meetings (Hague Minutes, page 67)—

"His Delegation also wished to have a sanction in the case where the carrier did not deliver a ticket or the ticket did not state that the carriage was subject to the Warsaw Convention"—

it is a far cry from the "airline owner" position now taken by Italy in its brief as *amicus*. Perhaps this later airline-owner status of the Italian Government also accounts for the lack of statements from Italian representatives illustrating concern for passengers at the Special Meeting of ICAO in Montreal in 1966, notwithstanding that Italy had four representatives at Montreal (Montreal Minutes, Annex A, preliminary page xiv), and the Delegate of Italy (Montreal Minutes, page 46, middle of page),

"wished to confirm his spirit of co-operation and his faith in the Warsaw Convention."

c. The United Kingdom

The international air carriers of the United Kingdom are British European Airways Corp. ("BEA") and Brit-

ish Overseas Airways Corp. ("BOAC"). Who owns BEA and BOAC? World Airline declares, at page 241 et seq., that BEA is a public enterprise owned by the Government; the same work announces, at pages 248, 251, United Kingdom's ownership of BOAC.

The representatives of the United Kingdom (hereinafter "UK"), moreover, at the various international conferences and meetings concerning air law, have not been bashful in showing their concern for the welfare of the international air carriers.

The chief of the UK delegation, at Warsaw in 1929, was Sir Alfred Dennis. The various national representatives were discussing principles of exoneration or limitation of liability of international air carriers, and the law as to maritime and railroad carriers and their freedom from, or limited, liability. In discussing a maritime convention of 1924, and a proposed UK amendment to the CITEJA pre-1929 draft which amendment would limit air carrier responsibility, Sir Alfred said:

> "Cette convention reproduisait originairement les conditions qui se trouvent dans le droit maritime et c'est pour cette raison que mon Gouvernement a accepté provisoirement et dans ses lignes générales le projet de convention de 1925 sur la responsabilité du transporteur. Depuis, au cours des discussions, sont intervenus des changements qui ont modifié le caractère général de ce projet de convention en ce qui touche la responsabilité due transporteur. Mon Gouvernement m'a recommandé de soutenir aussi énergiquement qu'il me serait possible mon amendement, parce qu'il trouve que, dans l'ensemble, la responsabilité qui est imposée au transporteur est beaucoup trop lourde."

A translation of the foregoing is:

> "This convention reproduced originally the conditions which are formed in maritime law, and it is for this reason that my Government accepted, temporarily and in its principal lines, the draft of convention of 1925 on the responsibility of the carrier. My Government has urged me to support as energetically as would be possible, my amendment because it finds that, as a whole, the responsibility put upon the carrier is much too heavy."

UK's concern for the carrier has been steadfast and consistent. After UK had adopted the Warsaw Convention as the *internal law* of UK in 1952 (See the First Schedule of English Carriage by Air (Non-International Carriage) Order, 1952 [S.I. 1952, No. 158]), UK's delegation at Rio in 1953 kept up its steady pressure against those provisions of Warsaw which attempted to afford some modicum of notice and protection to the international air passenger or air shipper. Here is UK's proposal to abolish all provisions relating to documents of carriage, plus its casual denigration of any right at all of a passenger to know that carriage is subject to Warsaw, as stated by its representative (Rio Minutes, pages 50, 51):

> *"Mr. Wilberforce* (United Kingdom) stated that the British Delegation was of the opinion that Articles 3 to 11 were superfluous and out of date and that they should be entirely deleted. Therefore, he proposed the deletion of these Articles for the following reasons:
>
> i) he considered that the framers of the Warsaw Convention had made one of their rare mistakes when they had decided to deal in the Convention with this question of documents of carriage. Docu-

ments of carriage fell within the administrative field. Documentation was a matter of detail, a practical matter which required revision from time to time, and it was unfortunate that it had been decided, in 1929, to include very detailed provisions in the Convention. The result was that they could not be amended unless by a new Convention. It would have been wiser to leave these provisions outside the Convention;

ii) he considered that these provisions were wrong in a number of respects. The Rapporteur had drawn the attention of the Committee to the particular difficulties concerning Article 3, but the same objections of a practical nature could be raised against the other Articles. It was to be borne in mind in that connection that, since 1929, there had been an enormous development in carriage by air, in particular, as regards the carriage of goods. The provisions in question caused serious difficulties to those who were engaged in such carriage;

iii) it was apparent that the various particulars, and especially those relating to the air waybill, were completely out of date, that it was not possible to comply with them and that, in fact, the carriers did not comply with them.

In proposing the deletion of these provisions, the Delegation of the United Kingdom was not advocating international anarchy. It was quite right that the interested parties should get together and try to reach agreement from time to time on documents of carriage for air transport, but it was not right that these provisions be set out in a Convention which could not be amended. This matter should be left to the Inter-

national Air Transport Association which could meet each year or twice a year and adapt them to changing needs, or the International Civil Aviation Organization which could adapt them to changing needs, or, lastly, to some organization of an administrative character which could continually revise them as necessary.

Some Delegates might consider, as had been the case in the past, that there should be—in any case as regards the carriage of passengers—a provision requiring that it be brought to the notice of the passenger that the carriage was subject to the Warsaw Convention. The British Delegation did not attach much importance to this but, if some Delegates considered that such a provision was necessary, his Delegation would not be opposed. The problem could be solved by a very simple provision which stated merely that a ticket must be issued to passengers and that it must contain the declaration to the effect that the carriage was subject to the terms of the Warsaw Convention.

If the Committee would not agree to the total deletion of the Articles on documents of carriage, the British Delegation would then have to propose certain amendments to the Warsaw Convention."

The fact that some delegations had described even the existing Article 3(2) of Warsaw –the Article now before this Court for construction in the instant cases—as "savage" and "illogical", did not deter the UK delegation. At page 57 of Rio Minutes;

"*Mr. Wilberforce* (United Kingdom) said that it was impossible for him to accept the solution which consisted in retaining the present provisions of the Convention as they were. Having looked at the Ar-

ticles (in question) of the Convention as a lawyer and having noted that there were serious defects in these Articles, he considered that it was his duty to do his best to eliminate such defects. It might be that the governments would consider later on that the improvements which the lawyers had attempted to make were not important enough, from the practical point of view, to justify the meeting of a diplomatic conference but, as lawyers, the members of the Committee could not adopt an attitude which would mean that they accepted the provisions such as Article 3 (2), which had been described as a savage and illogical provision, and Article 9, which provided that, if the number of packages, the nature of the packaging, etc. were not included in the air waybill, the provisions which excluded or limited the liability of the carrier would not apply. How could a lawyer accept Article 6 which was altogether contrary to practice and which could not be complied with by an efficient carrier?"

Because of determined opposition from all quarters, however, (Rio Minutes, page 58). "The proposal of the United Kingdom to delete Articles 3 to 11 was withdrawn."

The UK attack on Article 3 (2), or any amendments to it that would have the effect of letting the passenger know that his flight was subject to the limited liability provisions of Warsaw, continued. Again at Rio (Rio Minutes, page 182):

> "*Mr. Wilberforce* (United Kingdom) said that the article under discussion dealt with sanctions imposed on the carrier for not doing certain things. If this article did not exist, the position would be that, under the contract, the carrier would be, as a matter of common law, responsible for any damage on account of

the incorrect statements or omissions in the contract for which he was responsible. Therefore, the only purpose of introducing a special provision at this place of the Convention must either be to decrease the carrier's contractual liability in certain events, or to increase the contractual liability."

Shortly before that, at Rio, UK delegate and Rapporteur Major Beaumont (co-author of Shawcross and Beaumont on Air Law, which is referred to on pages 13, 15 of petitioner's brief herein as written by "leading writers" and as though it were objective and impartial in nature), had stated what he regarded as "the law"—a statement, admittedly, perfectly consistent with the present position of petitioner Alitalia and the various *amici* now supporting that position (Rio Minutes, page 177):

"*Mr. Beaumont* (United Kingdom), Rapporteur, said that the particulars to which Mr. Calkins had referred in Article 3 (i) (a), (b), (c) and (d) of the Warsaw Convention were not obligatory particulars, because Article 3(2) of the Convention made it very clear that it did not matter at all if any of those particulars were omitted. Carriers were not obliged, at present, to insert any of those particulars in the ticket and the omission of the particulars would not affect the position of the carrier or the passengers. The Convention should state definitely the particulars which must be contained. The Working Group had rightly limited the particulars which must be contained to those which were made obligatory under Article 3 of the existing Convention, including particulars which indicated whether or not the carriage was international."

The "Mr. Calkins" referred to was the chief delegate of the United States at both Rio and at The Hague and was then Chief, International and Rules Division, Civil Aeronautics Board, as shown by Hague Documents, page 21.

Again, at The Hague in 1955, UK returned to the attack. The effort to eliminate Article 3 of Warsaw and the related articles was renewed in 1955 with undiminished vigor by Mr. Wilberforce. In so doing, he took notice of court decisions, including a 1936 British holding which had taken the strict view that it was necessary to warn the passenger. The remarks are quoted in extenso to reveal the true position of the UK with respect to rights of the passenger (Hague Minutes, pages 46-48):

> "*Mr. Wilberforce* (United Kingdom) said that, at Rio de Janeiro, the United Kingdom Delegation had put forward a proposal that all the articles in the Warsaw Convention which related to documents of carriage, that is to say, Articles 3 to 11 inclusive, should be deleted. That proposal was not voted on at the Rio meeting, because it had been thought that a compromise might be adopted which would simplify the Warsaw Convention and yet preserve something relating to the subject. Having reconsidered what had been achieved at Rio de Janeiro, the United Kingdom Delegation now wished to invite the Conference to reconsider seriously the question whether it was desirable to maintain anything in the Protocol which related to documents of carriage at all.
>
> The provisions of the Warsaw Convention relating to documents of carriage were, in modern conditions, unsatisfactory. First of all, Article 3, relating to the passenger ticket had been described by high authority as futile and absurd, because it required delivery of

a ticket without seeing what the ticket was going to contain. . . .

There were, therefore, two questions in respect of which some step had to be taken. Firstly, were the present provisions contained in the Rio Protocol satisfactory, or could they be made satisfactory? Secondly, would the consequences of the total omission of these provisions be unfortunate or not? . . . The second respect in which the present provisions were unsatisfactory related to the sanctions to be imposed on non-compliance. The Rio Protocol imposed the sanction of unlimited liability. Consequently, a slip made by a booking clerk, or a perfectly unintentional error as to law, was visited by the same consequences as wilful misconduct. If the provision under discussion were read together with Article 25 as at present drafted, the result would be that the pilot or navigator, on whose skill the passenger relied for his safety, could be as negligent as he pleased, and yet liability would be limited. But, if a booking clerk made a mistake, liability was unlimited. That was difficult to defend from the legal point of view. On the other hand, if this solution were rejected, what alternative could be provided? A number of solutions were suggested in the documentation and the Conference might find it difficult to agree on what was the best of them. The provisions on documents of carirage were not satisfactory as they stood and the United Kingdom Delegation felt very grave doubts whether the Conference would be able to agree by a sufficient majority on satisfactory provisions to replace them.

The second question was in regard to the consequences of total omission. Would those consequences be unfortunate? In practice, the forms of tickets were worked out by commercial organizations connected

with air transport. In this regard, he was thinking not only of IATA but also of other carriers. It might be said that if there were nothing in the Convention, that would place too great power in the hands of those bodies and the passenger and the consignor of goods would consequently be helpless. He did not think that this would be so, for the reason that account had to be taken of the fact that many courts in many countries took a very strict view of any attempt to impose limitations of liability or to exclude liability and only gave effect to such limitations or exclusions if they were brought to the notice of the passenger. The carrier issuing a ticket had to take this into account Convention or no Convention and this provided a very effective safeguard. The United Kingdom Delegation was not speaking entirely from theory in that respect since the courts of the United Kingdom were among the ones thtat took a very strict view as to the necessity of warning the passenger. The case of *Westminster Bank vs. Imperial Airways Limited*[1] showed what a strict view the United Kingdom courts would take. Nevertheless, in spite of that, the United Kingdom applied the Warsaw Convention to domestic carriage within the United Kingdom and within the territories over which it was competent to legislate without applying the provisions of the Convention concerning documents of carriage. During the three years in which that legislation had been in force, no difficulty whatever had arisen. He commended that experience to the Conference as an indication of what would happen if the provisions on docu-

[1] United Kingdom King's Bench Division: [1936] 2 All E.R. 890; 155 L.T. 86; 52 T.L.R. 607; 80 Sol. Jo. 794; 42 Com. Cas. 1; 55 Lloyd, L.R. 242; (1936), U.S. Av. R. 39.

ments of carriage were removed from the Convention altogether.

There were two main arguments which had been used against the United Kingdom proposal. The first argument was that, if these provisions were deleted, the result would be a lack of uniformity in an important matter. But, he wondered whether the bare skeletal requirements of the Protocol, or even those of the Warsaw Convention itself achieved uniformity in regard to documents of carriage. All uniformity, in fact, came about, not because of the provisions in the Convention, but because of the sharing of experiences among commercial men. What brought uniformity was practice and not legislation of this kind. . . . He reminded the Conference that, at the Rio meeting, all commercial opinion which expressed itself was in favour of the deletion of these clauses. He referred to such bodies as the International Chamber of Commerce, the International Union of Aviation Insurers and the International Air Transport Association. Regard should be paid to the views of those bodies and the Conference could do no greater service to the advancement of civil aviation on an effective basis than by deleting the provisions under discussion from the Convention."

The correct and logical answer to the arguments of UK, as stated above and as stated over and over at the various international meetings, was given by M. Garnault, Delegate of France at the Hague meeting (Hague Minutes, pages 50, 51, when he rejoined:

"it should be remembered that air transport existed not only for the benefit of the carriers, but also for the users, that is, the nationals of the States represented

at the Conference. Since the principal object of the Convention was to subject the carrier to a more favorable regime of liability than that usually established by common law, it was equitable to consider the situation of the passenger and to draw his attention to the fact that, by participating in a specific carriage, he would, in consequence, be restricted in his rights. It had been said that the booking clerk would have difficulty in determining whether the Convention was applicable. Would the passenger have less difficulty in solving the same problem? Which of the two would be better able to solve the problem? The employee of the carrier skilled in his work and carrying out his habitual activity, or an occasional passenger? If either of the two parties mentioned were going to be placed in difficulty, the French Delegation would not hesitate to have the difficulty borne by the employees of the carriers."

"He was not convinced by the argument of Mr. Wilberforce to the effect that no difficulty had been encountered by the omission from the internal English law of the special provisions of the Convention concerning the form of the documents of carriage. If English users of air transport were always placed under a system of limited liability of the carrier whether the carriage was under English law or under the international Convention, there was no point in warning them by a special provision in the document of carriage. He was interested in an entirely different case, the case of a user in a country which had not included the provisions of the Warsaw Convention in its internal law. Such a user might, under his national law, have the benefit of a system of unlimited liability of the carrier when the internal law was applicable, and might be quite ignorant of the fact that,

when he undertook a journey under the Warsaw Convention, he would be subject to the restrictions of the Convention."

The position of the United Kingdom is similar, as Mr. Wilberforce said at The Hague, to that of IATA and of the International Union of Aviation Insurers ("IUAI"). This is easier to understand when one remembers that the limitations and restrictions of the Warsaw Convention are the *internal law* of UK; limitations, consequently, are the public policy of the United Kingdom as deliberately fixed by "The High Court of Parliament." The public policy in the United States, of course, as to limitations of liability on behalf of public carriers of passengers, is precisely the opposite.

d. *Canada*

Canada also files a plea on behalf of petitioner for a strict, literal construction of the Warsaw Convention. But Canada, also, is the owner of an international air carrier. The airline Air Canada (earlier Trans Canada Airlines), as World Airline notes at page 272, has its stock control "vested in the government-owned Canadian National Railways." Canada is thus an owner financially interested in recoveries for passengers injured or killed, on international air flights.

In 1929, Canada was a Dominion, and was not represented, per se, at the deliberations at Warsaw. Representatives of the Canadian Government did participate actively in the deliberations in Rio in 1953, at The Hague in 1955, and in Montreal in 1966, as is indicated hereinafter by references to the Minutes of those three conferences.

Mr. Nadeau of Canada, at Rio, originally supported the UK proposal for the elimination of Articles 3 to 11 of

the Warsaw Convention, stating (Rio Minutes, page 55): "the Canadian Delegation was in entire agreement with the proposal of the United Kingdom. Articles 3 to 11 of the Warsaw Convention should be completely eliminated." Later expressions of Canada at Rio and at the Hague, showing concern for the passenger and his notification of Warsaw limits, are somewhat difficult to reconcile with Canada's present position as purported *amicus* demanding a harsh and literal construction of Article 3 (2) of the original Warsaw Convention. Most of these statements emanate from Brigadier M. C. Booth who was the leading spokesman for Canada in Rio and at The Hague.

For instance, at the Rio meeting (Rio Minutes, page 118):

> "He asked if there was some special reason why the air carriers should enjoy a preferential treatment on this question of a limit of liability. It might be that in certain States, liability was limited in other modes of transport, but, in the areas with which he was familiar, liability was not limited in most other modes of transport. The liability of railways, buses and taxis was certainly not limited. Therefore, if the Committee decided to limit the liability of the air carrier, it should not be limited beyond a reasonable level.
>
> The liability of the operator of the aircraft had been limited in the Rome Convention to prevent the results of an accident from being catastrophic for the operator in question. It might be suggested that this was the basis on which the limitation of liability of air carriers under the Warsaw Convention should be established. However, this was not being proposed. The liability of the operator in respect of each person killed or injured was limited to 500,000 Poincaré francs under the Rome Convention. While it was true that, in that

Convention, different considerations applied, it would not be unreasonable to say that a human life under the Warsaw Convention should surely be worth at least half of what it was worth under the Rome Convention.

The cost of insurance had been constantly decreasing since 1946. For a return trip between New York and Rio de Janeiro, insurance could now be purchased for $1.00 for each $10,00 worth of insurance. The economic consequences for airlines would, therefore, seem to be negligible if the limit of the existing Convention were doubled or even tripled."

Whatever Canada's position may be in its *amicus* brief, it is clear that at Rio in 1953, Canada specifically recognized the importance of a passenger receiving notice so that he might procure insurance for additional protection of his family and himself. Brig. Booth (Rio Minutes, page 181) said:

"It had already been pointed out that the Working Group's text did not provide any adequate sanction in the case where a passenger was not given notice that the liability of the carrier to him might be limited by the Convention. This was an important fact. Passengers on airlines were from all walks of life and, certainly, the vast majority of them had never heard of the Warsaw Convention and had no knowledge of the fact that the liability of the carrier to the passenger might be limited by that Convention. It was important for every passenger to have this knowledge, so that, if he considered it necessary, he might take out additional insurance for his own protection over and above the amount for which the carrier would be liable."

Again, after noting that the agreement that the sanction imposed on the carrier by Article 3 (2) of the Warsaw Convention was unsatisfactory, (Rio Minutes, page 189), he added (same page):

> "was it necessary to provide for a sanction in the case where the passenger ticket had not been delivered, or where the statement that the carriage was subject to the rules relating to liability established by the Convention was not included in the ticket? In the view of the Canadian Delegation, the sanction provided by the existing Convention and the French proposal, whereby the application of the limits was excluded in the case of the non-delivery of the ticket, was too harsh, and should not be retained. On the other hand, the Canadian Delegation was of the opinion that it was important to notify the passenger that the liability was that provided by the Convention. The application of the limits of liability should, therefore, be excluded, in the case where the statement concerning the application of the Convention was not set out in the passenger ticket. This was the principle behind the proposal made by Canada."

Then, at The Hague, in 1955, (Hague Minutes, page 65), Brig. Booth's position was that

> "He felt that there was just one essential requirement, namely, that there be notice to the passenger along the line indicated by the Netherlands Delegation, the United States Delegation and by some others. His Delegation was opposed to sanctions, because it believed it to be the responsibility of the national law to ensure that its airlines comply with any requirements that might be contained in a convention such as this."

This opposition to a sanction is consistent with a later statement (Hague Minutes, page 132, near bottom of page).

Canada did note support for some "upward revision" of Warsaw-Hague limits at the Montreal meeting in 1966 (Montreal Minutes, page 17, at bottom, page 42, at top, page 97, page 130). But any concern for notification to the passenger of these limits—to whatever amount they might be raised—does not appear.

e. *ATA and IATA, the Air Transport Trade Associations*

The nature of the interest of the Air Transport Association of America ("ATA") and of the The International Air Transport Association ("IATA") is in part shown by the direct quotation from the brief (page 2 thereof) filed by these two trade and service organizations as *amici:*

> "ATA is a voluntary trade and service organization whose membership comprises virtually all of the scheduled, federally-certificated airlines of the United States. The names of the airline members of ATA are set forth in Appendix A to this brief. IATA is a body politic incorporated in 1945 by special Act of Parliament of Canada, 9-10 George VI, as an organization of the world's scheduled airlines. IATA has a membership of one hundred airlines from over sixty nations of the world. The names of the IATA member airlines are set forth in Appendix B.
>
> The airline members of both associations have a substantial interest in the matters at issue in this case. All of the members of ATA and IATA participate in the carriage of international air traffic—over their own international routes, through interline arrangements with other carriers, or a combination of both."

As APPENDIX B, at page 2a, of the brief of these *amici* further shows, among the numerous members of IATA are

included petitioner Alitalia of the *amicus* Republic of Italy, BEA and BOAC of *amicus* UK, and Air Canada of the purported *Amicus* Canada. Indeed, as Mr. Cooper of IATA specifically noted in 1953 at Rio (Rio Minutes, page 191), many of the members of IATA are governmental entities.

Like the *amicus* UK, the *amicus* IATA, at Rio in 1953 stood steadfast for the complete elimination of Article 3 of Warsaw and its provisions for any notice to international airline passengers. As its representative noted (Rio Minutes, page 53):

> "*Mr. Cooper* (IATA) stated that IATA was opposed to a revision of the Warsaw Convention for the present, but, if the Committee were to undertake any revision whatsoever, it must take into account the burden imposed on the carriers by the provisions on documents of carriage.
>
> There were three different interests involved in this matter:
>
> i) the interests of the public. In this regard, he drew the attention of the Committee to the comments of the International Chamber of Commerce which was certainly the most authoritative commercial organization in this field. The ICC was of the opinion that it would be unwise, at the present time, to attempt to revise the Warsaw Convention. If, however, it were decided to undertake a revision, the ICC considered that any amendments should be confined to a few essential points, and two of these points concerned the particulars to be included in the passenger ticket and the particulars to be included in the air waybill. The ICC suggested that details of the particulars to be included in the passenger ticket should not be included in the Convention which should also omit all details from the air

waybill leaving it to the carriers and users to evolve the exact form of this document in the light of commercial experience;

2) the interests of the great insurance companies. Everyone knew that transportation could not be carried on if insurance of the risks involved were not possible. The views of the insurers had been submitted to the Committee. The IUAI had pointed out that the regulations, which had come into force in the United Kingdom, in April 1952 and which applied the provisions of the Warsaw Convention to domestic and other international carriage, constituted a striking example of the way in which, with a minimum of amendment, the text of the present Convention could be brought reasonably up to date. In these regulations, the chapter of the Convention dealing with documents of carriage, had been to a great extent eliminated. The insurers of the world had pointed out that the decision taken by the British Parliament was sound and a perfectly proper way to expedite air transport;

3) the views of the International Air Transport Association, which represented the greater part of international air carriers. IATA had stated that the provisions of documents of carriage should be deleted from the Paris draft. If the Committee decided to amend the Warsaw Convention, it should delete provisions on documents of carriage.

If, nevertheless, the Committee decided to retain some provisions on documents of carriage, he hoped it would not require the delivery of an air waybill on acceptance of the goods. A shipper sent hundreds of packages at one time to an air company, and it was

practically impossible to issue several air waybills on delivery of every package.

He hoped, however, that the proposal of the United Kingdom for deletion would be adopted and that these very difficult clauses would be omitted from the revised Convention."

Mr. Cooper also stated the interest of IATA and its members in the low Warsaw limits at Rio:

"He pointed out that the limits had been fixed in 1929 and that, if any part of the transport activity of the world had increased, it was air transport and that, without the present limits, there would hardly have been the imposing record of increased use of aircraft by the public as passengers. The historical test could not be overlooked. The Warsaw Convention had been, with its limits of liability, a working rule under which air transport had increased immensely." (Rio Minutes, page 112)

Although IATA took the position that "any ticket at all" was enough under Warsaw Article 3(2), Mr. Cooper took note, even as far back as 1953 at Rio, that some lawyers did not agree (Rio Minutes, page 189):

"*Mr. Cooper* (IATA) was of the opinion that the Committee was considering one of the most difficult and one of the most important problems involved in the revision of the Warsaw Convention. A court had given a decision to the effect that, pursuant to the existing Convention, if any ticket at all were delivered, the obligations imposed by the Convention were complied with. Some lawyers did not agree with this principle and believed that, when a passenger ticket, as described in Article 3(1) had not been delivered,

the liability of the carrier was unlimited. Obviously, this matter had to be clarified, and it was evident that, if the second interpretation were adopted, the effect would be to impose on the carrier a penalty far beyond any justification, since it was provided that he could not only not take advantage of the limits, but also that he could not take advantage of the provisions excluding his liability," . . .

The foregoing Mr. Cooper, who, at The Hague in 1955 as Legal Adviser to IATA, served as an IATA Observer (Hague Documents, page 26), consistently took positions at The Hague similar to those maintained at Rio (Hague Minutes, passim).

Again, at Montreal in 1966, IATA maintained its previous positions as to the Warsaw Convention and as to "keeping down" limitations of liability. There, (Montreal Minutes, page 19):

"The IATA Observer indicated that the Association's first objective was to maintain the Warsaw Convention which, in its opinion, was a modern instrument. The second and the most important objective was to find a solution that would be generally acceptable to all parties to the Convention and the Hague Protocol. A further objective was to preserve the Warsaw system as a whole and to discourage any suggestion regarding alternative solutions. IATA was also interested in finding ways to meet the requirements of the large majority of cases—not necessarily all cases, but the average cases—to ensure the expeditious settlement of claims and to avoid the cost of litigation. The solution should entail reasonable cost so as not to hinder the normal development of civil aviation; it should safeguard the interest of the travelling public

as a whole and not merely one segment of it. Taking all of these objectives into consideration, IATA felt that the $50,000 limit agreed to by the airlines represented a reasonable and adequate solution. This figure, as the IATA Observer understood it, amounted in fact to a doubling of the average settlement of around $25,000 experienced by the United States in the year 1964.

Declaring that the figure of $100,000 proposed by the United States as the limit appeared to be unreasonable and unjustified, the IATA Observer indicated that his Association would not support it. He utilized data contained in a statement issued by the Air Transport Association of the United States in August 1965 (e.g., settlements in the U.S. during 1963 indicated no significant increase as compared with earlier experience, and the largest settlement in that year was $17,000) to show that the $100,000 limit could not be justified even in that country. He maintained that this high figure, if adopted, would encourage litigation, delay compensation payments and undermine the Convention. As regards cost—on the basis of the 50 cents per passenger figure suggested by the United States Delegate and an estimated total of 50 million passengers carried on scheduled and non-scheduled international flights in the year 1965, it would appear that at least some $25 million would be required of the airlines to pay for the experiment. Some airlines would probably have to pay more than others, and perhaps the smaller the airline, the bigger the share of payment, and all this would obviously be reflected in air fares."

IV.

Every Expression of United States Policy on the Warsaw Convention Has Clearly Stated That if the Carriers Do Not Give Passengers Adequate Notice of Warsaw Limitations, the Carriers Must Suffer Loss of the Liability Limitation. Since the United States Has Steadfastly Maintained That Passenger Notice Is Essential to Warsaw Limitation of Liability, It Cannot Be Claimed That the Decision Below Causes Surprise or Any Breach of International Understanding.

a. *In General*

The briefs submitted by *amici* ATA, IATA, United Kingdom, Italy and Canada seek to convey the implication that the decision below is, in effect, a breach of faith on the part of the United States, and therefore that the other parties to the Warsaw Convention had some kind of vested right to assume that the United States would never require passenger notice to support limited Warsaw liability. In effect, these a*mici* seem to imply that they have been relying upon such a United States position.

In point of fact, as shown below, the entire history of American policy expressions on Warsaw and related topics, is to the opposite effect. There has never been any U.S. policy other than requirement of passenger notice to support limited Warsaw liability, and therefore there could not possibly have been any reliance upon a contrary policy.

b. *U.S. Policy Statements at Rio*

The United States did not participate at Warsaw and so we must begin our consideration of U.S. expression of its position at the Rio meeting of 1953, where Mr. Calkins

of the Civil Aeronautics Board was the chief U.S. delegate. He spoke clearly, in objecting to any deletion of Article 3 of Warsaw, and as to the necessity of provisions in documents of carriage (Rio Minutes, page 54):

> "If it were left up to IATA to establish the contents of the documents of carriage, the carriers would be given a tremendous weapon which could be used to the disadvantage of the shipper and the passenger. Besides, IATA did not include all the international carriers.
>
> If it were left up to an international authority to establish the contents of the documents of carriage, it would cause grave constitutional difficulties in the United States, which could not adhere to a convention delegating the power to make laws to an international body. . . . in the documents of carriage, the carrier was obliged to notify the passenger or the shipper that this liability might be limited. The Delegation of the United States was of the opinion that the passenger ticket should contain the express provision that the carriage was subject to the terms and conditions of the Warsaw Convention which might limit the carrier's liability."

c. *At the Hague*

Mr. Calkins was also the chief American spokesman at The Hague in 1955. Here he repeatedly stressed the governmental policy position of the United States that an airline passenger must be notified, in a manner that he would understand, that if he flew on an "international" flight, the liability of the air carrier would be limited in amount. And notification in a manner that the passenger could comprehend meant notice in a type size that he could read and that would be discernible.

As to American preference for a "private" (recovery from the carrier) sanction, he said (Hague Minutes, page 81):

> "The system of sanctions set out in the present Convention was the most appropriate one, because it was based on the passenger ticket itself. The whole Convention was based on the passenger ticket; consequently, if the ticket did not contain the provisions that were required by law to be set out in it, then the contract did not, in fact, meet the requirements of the Convention. Under these circumstances, it was only just and equitable that the carrier should suffer the consequences. One might think otherwise if the danger to the carrier were really very great. But if the United States proposal for a form of advice to passengers were adopted by the Conference, the danger would not be very great. The form could be included in every ticket, and consequently, all that the agents of the carrier need do would be to fill out the ticket properly. This was not much to ask of the carrier in return for the reduced liability which the Convention accorded him."

He renewed the plea (Hague Minutes, page 128):

> *"Mr. Calkins* (United States) preferred to have sanctions imposed by private law rather than having them imposed by the various States under public law. The reasons for this preference were, first of all, that with a private law sanction there would be the possibility of applying a uniform sanction for non-compliance with the requirements of the Convention, and secondly, the policing of these sanctions would be made more easy. . . . In the case of private law sanctions, no heavy policing was required because, in the

event that no ticket was issued, the claimant had his remedy against the carrier. . . . He did not feel that the sanction should apply to the particulars concerning a place of departure and place of destination and the agreed stopping places. The passenger should certainly assume the obligations of seeing to it that the ticket issued to him set forth these places. However, the sanction should apply to the particulars concerning this notice."

Again and again, at The Hague, the United States hammered at the need for notice for the international passenger, in a comprehensible form, in print that would stand out, as a fundamental of American Policy. Mr. Calkins stated (Hague Minutes, page 60):

"Every State had the responsibility, not only for maintaining its air transport services, but for protecting its citizens and giving to those citizens a transportation service that was just and equitable. . . .

His Delegation felt, in regard to the notice requirement, that this requirement of the passenger ticket, the baggage check and the air waybill was the one requirement which really formed the crux of the whole difficulty. . . .

His Delegation proposed that Article III (a) of the Protocol—Article 3(1) of the Convention—should provide that every ticket sold by an international airline, or by any other airline, for that matter, should include the . . . provision:

'Advice to International Travellers' (in letters not less than ½ centimeter high)."

Also (Hague Minutes, page 61):

"It had been remarked that this notice was really unnecessary and that all citizens were presumed to

know the law. That might well be true in ordinary commercial affairs. However, it did not solve the problem in this case, since, in air transportation, domestic passengers travelled side by side with international passengers. In the ordinary course of commercial affairs and in day-to-day living, a person expected to be treated in the same way as other persons who were in the same group in a public transportation vehicle. Here, the matter was different. Persons on international carriage were subject to the Warsaw Convention; those confined to domestic transportation had the benefit, in some countries, of unlimited liability, which was much more preferable for the passenger than the limited liability of the Convention. As a result of this, States would insist on putting some kind of a notice requirement and on imposing it on international carriers coming into their territory. The result was that there would be a variation of law, a variation of requirements and there would be as many requirements as there were States. There might be as many decisions as there were courts, because the matter would be left up to the court."

Then (Hague Minutes, page 74):

"In addition to having a notice more or less in the same form as his Delegation had already proposed, he now proposed that the notice should be printed in a different coloured ink on the ticket so as to make it stand out."

"He disagreed with the opinion of Mr. Alten to the effect that the notice provision was worthless. To a certain extent, the value of the provision depended on the amount of internal carriage that went on in a country. There was a very great amount of internal carriage in the United States and the international

carriage was, perhaps, the exception rather than the rule. Consequently, the notice provision was extremely necessary for the United States, and also for other countries where internal transportation was highly developed. The provision jeopardized nobody and had the advantage that all transportation from a Contracting State to a non-Contracting State and back was covered by the Convention. Since almost all international air transportation was likely to be round-trip transportation, the notification, as recommended by the United States, did put the passenger definitely on notice that his rights to get a recovery would be limited."

Finally, Mr. Calkins likened the passenger, in accordance with American policy as to relationships between a carrier and a passenger, to the "man in the street," saying (Hague Minutes, page 116):

"he believed that it was desirable that the text be couched in a form which the man in the street or ordinary traveller could understand, without the use of legal terms that might be difficult to understand; the form of the text should also put the man in the street or passenger on notice that if he were taking a journey of a certain type, his rights against the carrier would be limited."

d. *United States Governmental Policies and Statements of Position, 1962-1963*

Frequently, in 1962 and 1963, the United States Government and various Departments and Agencies affirmed the strong American policy as to the necessity for notice of limitations of liability and as to adequacy and understandability of any purported notice.

In 1962, the United States Interagency Group on International Aviation ("IGIA") issued a report dated August 7, 1962, relating to the Warsaw Convention and the Hague Protocol, after the most extensive study of the subject ever made by the U. S. Government. One of the recommendations of IGIA was that air carriers be required to give "clear and positive notice of the limitations of liability article (Article 22) of the Warsaw Convention." Attached to said report were recommendations of various United States governmental departments and agencies, including the Civil Aeronautics Board, the Federal Aviation Agency, the Department of Justice, the Department of Commerce, the Department of Labor, etc. The recommendations of these departments and agencies are easily accessible and are contained in appendices to said IGIA Report of August 7, 1962, which is listed as "IGIA 23/1.10A." It is perfectly clear that as early as August, 1962, all the governmental agencies and departments involved reached the conclusion that the language then contained in international air carrier tickets did *not* give adequate notice of the limitations of liability in the Warsaw Convention.

The point was stressed by Senator Homer E. Capehart in comments on the Warsaw Convention which, on November 10, 1961, he addressed to IGIA (see Attachment No. 61 to IGIA 23/1.3) in the following language:

> "This is the most unconscionable provision in all our history ever to affect adversely all American citizens. There is absolutely no need for a provision of this nature, and the felony is compounded in that less than one-half of one percent of the passengers in international traffic are even aware of it."

Further, the IGIA Report stated that a passenger:

> "should be positively advised, when he buys his ticket or when he checks in, of the exact amount of the carrier's limitation of liability."

To give the gist of IGIA 23/1.10A, at page four of a letter from N. E. Halaby, Chairman of the International Group on International Aviation, to The Honorable Dean Rusk, the Secretary of State, dated August 3, 1962, the following language was used:

> "It is also recommended that in supplementary legislation United States air carriers be required to give clear and positive notice of the limitation of liability article (Article 22) of the Warsaw Convention and the extent of coverage under the automatic insurance plan. Thus each passenger intending to embark on carriage covered by the Warsaw Convention should be positively advised, when he buys his ticket or when he checks in, of the exact amount of the carrier's limitation of liability under both the Protocol (or the Convention) and the insurance plan. Such a passenger would then have the opportunity of buying at his own expense additional insurance according to his needs."

While there was considerable division among the IGIA member agencies on other phases of the IGIA Report, there was unanimity on the need for "clear and positive notice".

Shortly after the adoption of said IGIA report, counsel for *amicus Arnold Holtzman* wrote a letter on September 27, 1962 to Alan Boyd, then Chairman of the Civil Aeronautics Board, calling attention to this unanimous IGIA recommendation that clear and positive notice be required,

and requesting the C.A.B. to take action thereon. This letter is reproduced as Appendix A of this brief.

Following this letter, the C.A.B. took action, by issuing a notice of proposed rule making, Economic Regulations Docket 14411, dated April 1, 1963, dealing with Part 221 of the Civil Air Regulations, concerning the construction, publication, filing and posting of tariffs of air carriers and of foreign air carriers. The C.A.B. in this notice of proposed rule making, was giving notice of its proposed action as to the limitation of liability for death or injury of passengers under the Warsaw Convention. The first paragraph states:

> "Notice is hereby given that the Civil Aeronautics Board has under consideration a proposed amendment to Part 221 of the Economic Regulations that would provide for improved notice of limitation of liability for death or injury of passengers under the Warsaw Convention."

Thereafter, in the "Explanatory Statement" of some seven pages attached to the foregoing notice, it was stated, on page two:

> "The Warsaw Convention requires that the passenger be given a ticket containing a statement that the transportation is subject to the rules relating to liability established by the Convention. The carriers comply with this requirement by a notice in small print on the face of the ticket reading as follows: 'If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.' It appears

to the Board that this notice may be inadequate in two major respects: First, the ticket is by no means the most effective instrument for advising a passenger of a limitation of liability. There can be no assurance that a passenger will read his ticket at all or if he does, that he will read it under such circumstances as will enable him to realize the significance of the notice provision and take such protective action as his circumstances require. The type in which the notice is currently printed on the ticket is too small to alert the passenger to the importance of the matter. Second, the fact of greatest significance to the passenger, namely, the amount of limitation on liability for death or injury does not appear in the notice."

Then, on page four, the Explanatory Statement declares as follows:

"On January 22, 1963, the member carriers of the Air Traffic Conference of America (ATC) submitted to the Board for approval under §412(b) of the Federal Aviation Act of 1958, a resolution effective March 22, 1963, providing for an approved form of notice of the limit of liability of the Warsaw Convention, by means of a prescribed statement on a separate sheet of paper to be placed in the ticket envelope or attached to the ticket. (Agreement No. C.A.B. 16950)."

Thereafter, on April 1, 1963, the Civil Aeronautics Board adopted Order No. E-19447, referring to Agreement C.A.B. No. 10559, R-2, Docket No. 14411; and, on the second page of the order, it made the following remark and order:

"In the Explanatory Statement of the proposed rule the Board set forth reasons why it considers present means of giving notice of Convention liability limita-

tions inadequate. Insofar as applicable to the notice provisions now appearing in the ticket, the Board stated (1) the type in which the ticket notice is currently printed on the ticket is too small to alert passengers to the importance of the matter, and (2) that the monetary limit of liability for death, or injury does not appear in the notice."

Thus, because of the unsatisfactory nature of the then existing notice, the Civil Aeronautics Board in 1963 adopted this regulation (§221.175, Economic Regulations) which required air carriers and foreign air carriers to give more complete and adequate notice of Warsaw Convention limitations to passengers to and from the United States.

e. ***At Montreal Special Meeting of ICAO in 1966***

Following the United States denunciation of the Warsaw Convention in November, 1965, a Special Meeting of ICAO to consider limits for passengers under Warsaw and Hague was commenced at Montreal on February 1, 1966. The large American delegation was headed by Andreas F. Lowenfeld, and included Allan F. Mendelsohn, both then of the United States Department of State. Mr. Lowenfeld made it abundantly clear that the principal concern of the United States was the protection and welfare of American air line passengers.

In making a general opening statement, he said (Montreal Minutes, pages 5, 6):

"his country had already made clear its point of view: the Warsaw Convention or, to be specific, the limits of liability set forth in that Convention had outlived their time. The large attendance at the Meeting was testimony to the general recognition of the need to re-examine the Convention signed at Warsaw in 1929.

He agreed with the President of the Council that that Convention was an excellent compromise between the different legal systems of the world and fully justified as such. On the other hand, the compromise between the interests of the airlines and those of the airline passengers established by that same Convention was a questionable matter. The principal concern of the Government of the United States was to protect United States citizens of practically all economic levels who in ever-increasing numbers were making use of international air transport. The Meeting should bring up to date the compromise established in 1929 without, it was hoped, disturbing the legal regime underlying the Warsaw Convention. . . .

Speaking on the background of the issue before the Meeting, he briefly outlined the point of view of the United States. His country was mindful of the fact that the Warsaw Convention was one of the most widely accepted and most significant Conventions of private air law. It had contributed to the development of civil aviation and, to a certain extent, to the uniformity of interpretation and practice. However, it had been signed in 1929 at a time when international aviation had hardly emerged from the experimental stage and when it had to be protected from the risk of catastrophic accidents. Today, international aviation had become a vast business. Present-day technology had greatly reduced the risk involved in flying. The United States therefore considered that a Convention designed to tip the scales heavily in favour of the airlines to the prejudice of the passengers, was no longer justified. His Delegation believed that there should be a fair balance between the interests of air passengers and those of aviation.

Air safety was considerably greater today than in 1929, as confirmed by the accident rate of 0.61 passenger fatalities per 100 million passenger-miles. For the period from 1925-1929, the rate was 45 passenger fatalities per 100 million passenger-miles. There was thus no longer the same concern as in 1929 about the serious economic consequences one single air disaster might have for aviation.

The volume of air traffic had increased enormously with no sign of let-up. In 1964, 38 million passengers travelled on scheduled international air services, amounting to a total of 76 billion passenger-kilometres. Between 1925 and 1929, i.e. over a five-year period, airlines flew a total of only 400 million passenger-miles.

Regarding the cost of insurance, he commented that insurance companies were very reticent about giving figures. In his view, insurance costs were approximately 1% of operating costs, for example, on the North Atlantic. Assuming that these costs were to increase by 50% as the result of a liability limit of US $100,000 under the Warsaw-Hague system, there would be a consequential increase in operating costs of approximately 1.5%. The cost per passenger would rise approximately by $1.00 to $1.50 on a one-way trip from New York to London.

In respect of limits of liability, it had been said by some foreign Governments that the United States was seeking to impose its standard of living on all the other countries in the world. Nothing could be further from the truth. The United States did not interpret limits to mean the average compensation payable, because 'average' would mean that 50% of the persons involved had suffered damages. Only when a limit was as inadequate as that of the Warsaw Convention was there a tendency for it to be at an average level. . . ."

Resuming the argument (Montreal Minutes, pages 30, 31), he declared:

"Every victim of an accident had the right to equitable compensation. No matter what methods were used in the different countries or even by the various courts and administrative authorities within the same country, the aim was always the same: to determine the compensation for the financial loss suffered by the victim or, in the case of death, by the dependents. So far as possible, the financial indemnification was not intended to punish those responsible for the accident, but rather to restore to the dependents the financial circumstances which had existed before the accident. . . .

Non-Warsaw claims—The aforementioned Table shows that during the same period the average compensation per passenger had amounted to approximately U.S. $38,500. From 1958 to 1964, the average compensation had been around U.S. $52,500, a figure which should be borne in mind. The United States was not concerned with average compensation, but with the consequences of a limit. In other words, they were interested in the percentage of persons who, regardless of the limit, did not receive what was due to them as a result of the operation of the limit. If that coincided with the average, 50% of passengers would consequently be placed at a disadvantage. . . .

The effect of the raising of the insurance premium upon the overall operating expenditures of the airlines had been estimated for the year 1964 as follows: 64 cents per 1,000 passenger revenue miles; 80 cents per 1,000 of the latter at a U.S. $50,000 limit; 90 cents on the same calculation with a limit of U.S. $75,000; and 86 cents at a limit of U.S. $100,000. The difference of the cost of insurance between U.S.

$75,000 and U.S. $100,000 amounted to only 6 cents per 1,000 passenger revenue miles.

In conclusion, he stated that a) the Warsaw Convention was inequitable and constituted a burden which the United States could no longer impose upon its nationals and b) that the expenditure involved in the proposed new limit was altogether reasonable and would impose no heavy burden either upon the world's airlines or their passengers."

Again (Montreal Minutes, page 43):

> "the Delegate of the United States indicated that he realized that his country was only one among many, but having a great many airlines and a great many citizens travelling all over the world, his country must to some extent take its own interests into account. . . .
>
> Speaking to the references made to the generosity of the United States, he said that if airlines needed support, or countries needed support, there were ways to secure it. The United States did not believe that it could continue to ask in effect the widows and orphans of its citizens to assume this burden."

Also, as to the protection of the passenger (Montreal Minutes, page 60):

> "In his opinion, however, there was a difference between a race horse and a passenger. As he had already pointed out, the protection of the passenger was at the very core of the United States considerations."

In closing his remarks, and stressing the "famous small print purporting to give notice" of the Warsaw Conven-

tion and its limits, Mr. Lowenfeld stated (Montreal Minutes, pages 140-142):

"It is with considerable sadness that I have asked for the floor at this time. The United States delegation thought that it had come to Montreal well prepared with facts and with arguments in support of our position. We thought we had made a persuasive presentation for the proposition that the Warsaw Convention needed to be updated, and updated substantially. We believed, and still believe, that the United States proposal, or something close to it, would have been in the public interest. It would have secured justice for many persons, and at very little cost.

We thought that this Conference would recognize that commercial aviation is no longer an infant industry entitled to special shelter, but that it should be treated like other persons or businesses dealing with the public. In other words, we thought this Conference would recognize the principle that persons or firms engaged in international commercial aviation—whether airline, manufacturer, or ground control—should, on the whole, be held responsible for injuries done to others. . . .

We hoped until today that it might yet be possible to lay a firm foundation here for a successful diplomatic conference, and to work out an interim arrangement along the lines of this Conference's recommendations. If this had come about, our delegation had hoped to recommend to our government that it withdraw the United States notice of denunciation of the Warsaw Convention. It was not to be, and we are sorry.

But we should not, Mr. Chairman and fellow delegates, feel too sad. From the point of view of the

traveling public, there can be no doubt that this Conference has had a wholesome effect. All the countries represented here, and doubtless many others that will hear and read of the work of this Conference, have come to think hard about the question of the obligation of airlines toward their passengers. Nearly all countries have agreed—as every one of our exploratory votes proved—that the Warsaw Convention limits are obsolete and unfair. Whatever the timing, whatever the procedure followed, we may be sure that the Convention will be brought up to date or will gradually fade away. In the long run, the aviation industry, which has always been proud of its position in the forefront of human advance, will not—indeed cannot—stand still on the simple, and morally clear-cut issue of protection of its customers. . . .

So far as the United States is concerned, Mr. Chairman, let me state again that while we are disappointed that this meeting could not have reached a more clear-cut result, our impatience on the issue of compensation for accident victims is due only to our concern for the traveling public. . . .

We hope and expect that the uniform practices established in the light of the Warsaw Convention will be maintained—all, that is, except for the famous small print purporting to give notice of the applicability of the Convention and of the limits of liability contained therein. . . .

We expect that courts in the United States—and, accordingly, out-of-court settlements—will treat persons involved in air accidents like persons involved in any other accidents. Thus compensation will be based on the passenger's earning capacity, his life expectancy at the time of accident, and the degree of dependence of the survivors. There will be some high

settlements and some low ones, and there may well be some judgments in favour of the carriers.

Limitations on liability, whether statutory at the place of accident or by contract in the ticket, will almost certainly be disregarded on the ground that they are contrary to public policy. But you may be sure that foreign carriers will receive full justice in the United States. Further, where foreign residents bring suit in the United States, it will be the passenger's earning capacity, his life expectancy, and the status of his survivors in his own country, as well as that country's concepts of proper compensation for accident victims that will generally govern the result in the United States."

f. *In 1966 and 1967, Following Purported Withdrawal of the Denunciation of Warsaw in May 1966*

Following the purported withdrawal of the denunciation of the Warsaw Convention in May, 1966 and the creation of the so-called "Interim Agreement" by some of the international air carriers, there have been repeated strong statements of policy by the United States Government, and its Departments and Agencies, as to the absolute necessity of notice to an intending passenger of the applicability of Warsaw and of its limitations of liability, plus a notice in discernible and understandable form, not in fine print or type.

On July 14, 1966, Mr. B. T. Twigt, Secretary General of the International Civil Aviation Organization, (ICAO) distributed a letter concerning the Warsaw Convention. There was also distributed a copy of a proposed reply prepared by an *ad hoc* working group of IGIA. The proposed reply thus prepared by the working group of IGIA, was distributed by Mr. John H. Wanner, Consultant to

the Civil Aeronautics Board, to various persons, on or about September 6, 1966. On pages 8 and 9 of said proposed reply, appears the following matter:

"The United States recognizes that in certain other countries the problem of notice may not be as acute as it is in the United States. This would be particularly true in countries where almost all travel by the citizens of that country is in international air transportation subject to the provisions of the Warsaw Convention, or where by domestic law the Warsaw system of liability had been extended to cover domestic and non-Warsaw international travel as well. In the United States, however, and possibly in a number of other countries, the Warsaw system is not applicable to domestic transportation, and in such cases the liability of the airline is normally unlimited. Accordingly, if liability is to be limited for U. S. passengers in international, as distinguished from domestic transportation, adequate notice must be given. In this connection it should be noted that in the last few years courts in the U. S. have become increasingly strict in their application of the notice requirements of the Convention. The protection of the limits of liability have [sic] been denied to defendant air carriers in cases where, for example, the ticket and notice were not delivered to the passenger to make insurance or other arrangements, or where the notice was printed in fine type and failed to give proper notice. (The letter then states the following authorities—*Mertens* v. *Flying Tiger Line, Inc.*, (1965, C.A. 2 N.Y.) 341 F.2d 851, cert. den. 382 U.S. 816 (1955); *Warren* v. *Flying Tiger Line, Inc.*, (1965, C.A. 9 Calif.) 352 F.2d 494; and the trial court opinion in the instant *Lisi* case, (1966, S.D.N.Y.) 253 F.Supp. 237.)

Thus, the question of notice has recently become of greater importance to those airlines carrying Warsaw traffic to, or from, the United States."

(The foregoing language from the proposed letter was repeated verbatim on page 6 of the letter of September 6, 1966, signed by Nelson B. David, United States Representative, sent to Mr. Twigt. This latter was the final draft of the letter as approved by IATA for and on behalf of the United States.)

Attached to these papers, among other appendices, was an Appendix B, dated 4 May, 1966, from Montreal, which was a text filed by I.A.T.A. air carriers with the Civil Aeronautics Board of the United States, providing as follows, in paragraph #2, on pages 1, 2:

"Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention or the Convention as amended by the Hague Protocol and by the special contract described in paragraph #1 the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) the piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope: Advice to International Passengers on Limitation of Liability."

(Then follows the provision contained in the so-called agreement of May 16, 1966, whereby certain of the international air carriers agreed to raise the limit of liability to $75,000.00 per passenger.)

Subsequently, on September 19, 1966, the Civil Aeronautics Board gave notice of proposed rule making as to

Part 221, Economic Regulations Docket No. 17725, with respect to posting of notice of limitation of liability for death or injury of passengers under the Warsaw Convention. Attached to this notice of September 19, 1966, is another Explanatory Statement starting with page #3. On page #4 of this Statement, the following language appears:

> "By this agreement, the parties thereto bound themselves to include in their tariffs effective May 16, 1966, a special contract in accordance with the Warsaw Convention or the Hague Protocol providing for a limit of liability for each passenger for death, wounding or other bodily injury of $75,000.00 inclusive of legal fees. The parties further agree to provide in their tariffs that the carrier would not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of certain defenses. The carriers further stipulated that they would, at the time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising such international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to in these special contracts pursuant to the Convention or Protocol as described above."

In the final draft IGIA letter of September 30, 1966, signed by Mr. David on behalf of the United States Government and sent to Mr. Twigt of ICAO, the following appears on pages 5, 6:

> "As to Question (4): *The inclusion of a provision concerning advice to international passengers on limitation of liability.*

The United States considers that the notice provisions of Article 3 of the Convention, and of the Convention as amended by the Hague Protocol, are inadequate, and that they should be amended so as to provide more effective notice to passengers. Experience in the United States demonstrates that many passengers on international flights are unaware of the applicability of the Warsaw Convention to their trip. The notice required by the Convention is usually printed in small type on the ticket, and, along with many other standard terms and conditions of the ticket, comprises material which the average passenger does not take the time to read. Moreover, even if the passenger does read the notice, it fails to state that a limit of either $8,300 or $16,600 may be currently applicable to him. Although more complete notice is now being given by carriers who are parties to the Interim Agreement, that agreement is an interim and voluntary arrangement only, and is not applicable to all carriers and all Warsaw transportation.

Because of the unsatisfactory nature of the existing notice, the Civil Aeronautics Board in 1963 adopted a regulation (Sec. 221.175, Economic Regulations) which requires air carriers and foreign air carriers to give more complete and adequate notice of Warsaw limitations to passengers to or from the United States. While many alternative forms of notice could be considered in lieu of the one adopted by the Board, we believe that some notice of this general character should be included. The form of notice incorporated in the Interim Agreement can also serve as a starting point."

On December 23, 1966, a draft of a "position paper" prepared by an IGIA working group was disseminated

for points of view in order to prepare the position that the United States would maintain at an ICAO meeting of a Panel of Experts on Warsaw limits to be held in Montreal on January 19, 1967. The draft was transmitted by Mr. John H. Wanner, Consultant to the CAB. At page 9, it stated:

> "Since the Interim Agreement is an inter-carrier, rather than inter-governmental, agreement, strictly speaking an ICAO meeting is not an appropriate forum in which to consider possible changes in the Agreement in order to remove or minimize any deficiencies which have been discovered in it. Nevertheless, no objection on this ground should be raised to any such suggestions, since the Panel meeting may well be the best forum to obtain an objective discussion of such problems."
>
> "There may also be complaint that the notice requirements under the Agreement are unsatisfactory, and indeed are chaotic. . . .[2]

[2] The airlines apparently are fearful that failure to give the notice required by the Interim Agreement may be deemed to be failure to give the notice required by Article 3 of the Convention, and thereby subject the carrier to unlimited liability."

After the Panel of Experts met, an ICAO "letter" known as ICAO-S-18/8-67/28, dated March 2, 1967, was sent, covering the work of the Panel on Warsaw and Hague limits of liability at their "First Session." Mr. Wanner had attended as a Member representing the United States. Attached as a restricted document was PE-Warsaw Report-1, 31/1/67. At page 4, ¶ 12, this Warsaw Report noted:

> "Views were strongly expressed in the Panel to the effect that the carrier should not be deprived of the

benefit of limits of liability merely by reason of some irregularity in the issuance of a ticket or of a notice to passengers. The requirements of Article 3 of the Warsaw Convention in regard to ticketing or notice are not unimportant, but they could be enforced by other measures, e.g., by a fine or a refund of the passenger fare in whole or in part. While this was the general view of the Panel, one member considered that such deprivation provisions were required in order to ensure compliance by the carrier with the notice requirements."

In ANNEX B, at page 9, the following points were examined:

"1) The combined effects of the U. S. Court decisions in the case of Mertens v. Flying Tiger Lines and Lisi v. Alitalia in conjunction with the waiver provisions of the Interim Agreement could result in absolute and unlimited liability for air carriers. The carrier which may have lost the limitation of liability for non-compliance with the notice requirement of the Warsaw Convention may also face the consequences of its contractual waiver of the defences under Article 20(1) of the Warsaw Convention. Serious consideration should therefore be given to a temporary amendment of the Interim Agreement as a matter of urgency so as to relieve the carriers of the waiver provisions in the Interim Agreement until the effects of the Lisi case on notice requirements under the Warsaw Convention can be clarified and satisfactorily resolved."

"3) Under the Interim Agreement claimants could recover up to $75,000 and use this sum for the prosecution of further proceedings against the air carrier

or third parties, unless the new limit is expressly made an alternative remedy leaving it to the election of claimants whether to proceed under the Interim Agreement or under the normal rules of the Warsaw Convention. This risk is accentuated by the combined effects of the *Lisi* and *Mertens* cases mentioned above."

And, same document, (page 10):

"7) The legal effect of a failure to give notice under the Interim Agreement is not clear. If the notice requirement is retained, consideration should be given to a provision that the failure to give the notice required by the Interim Agreement does not affect the carrier's liability under the Convention."

The next document is a draft, transmitted in a letter sent April 12, 1967, from the same Nelson B. David, United States Representative, to Mr. Twigt of ICAO, in response to the Twigt letter of March 2, 1967. This "draft" from Mr. David submits the comments of the Government of the United States. On page two thereof, Mr. David made the following significant observations:

"*Solution II.* This proposal, although somewhat similar to the present Interim Agreement between the airlines (Agreement CAB 18900), would not be acceptable to the United States in its present form in view of the numerous qualifications which have been proposed, such as elimination or restriction of the notice provisions and of Article 25, and the addition of exceptions to the rule of absolute liability. Only if the limits were raised substantially above those now stated in the proposal would the United States be willing to consider inclusion of any of such qualifications.

In the view of my Government, the notice provisions of the Convention and Protocol are of major importance, and require strengthening rather than weakening as suggested by the majority of the Panel. The reasons for this view are set forth in my letter of September 30, 1966, and need not be repeated here. Unless substantial parity is achieved between the levels of liability applicable to both foreign and U.S. domestic air transportation the need for notice to passengers embarking on international journeys will continue.

In this connection, we do not agree with the Panel's recommendation to weaken the notice provisions. It may be that a majority of the Panel believes that no notice provision can be made effective as a result of recent court decisions in the United States with respect to notice requirements. In our opinion, however, these instances in which it was held that the carriers failed to give adequate notice in fact serve to emphasize the need for greater effort on the part of the carriers rather than a need to weaken or eliminate the notice requirements of the Convention. Certainly we do not agree that these decisions have rendered provisions on notice unnecessary or meaningless."

There ensued another letter from Secretary General Twigt of ICAO, dated August 2, 1967, transmitting the "Second Report" of the Panel of Experts after the Panel had held its second session from 4 to 18 July 1967. This letter is S 18/10-67/145. Attached thereto was another restricted document, another Report of the Panel, known as PE-Warsaw Report-2, 18/7/67. Mr. Wanner had again attended the Second Montreal Session of 1967 as the United States Member of the Panel. A number of statements showing the steadfast position of the United States on notice are contained in this Report of the second session.

First, in order to appreciate the United States position, one must know the proposed revisions suggested by the Panel. The Panel's revision as to notice is contained in ¶ 7 on page 3 of the Report:

"7. The following features will be common to both Solutions I and II as revised at this session:

(1) *Notice:*

Article 3 of the Warsaw Convention as amended at The Hague should be so revised as to eliminate any possibility that the carrier would lose his limitation of liability because of non-delivery of ticket or notice or any other defect in the documents of carriage. Reasons for this view are stated in Annex 1 hereto."

Part of the United States rejoinder is contained on page 5:

	Exclusive of Costs	*Inclusive of Costs*
"Solution I	US $ 75,000	US $100,000
	37,000	50,000
Solution II	58,000	75,000
	33,000	43,000

8.1 In specifying the limits applicable to Solution I, the Panel bore in mind that any amount exceeding $100,000 would be unlikely to be acceptable to a large number of States.

8.2 The Member from the United States of America pointed out that the comments from his country indicated that the benefits to passengers under international and U.S. domestic rules and limits of liability should be approximately equivalent before elimination

of the notice requirements of the Convention could be considered. In view of the Panel's recommendations concerning notice (see paragraph 7(1) above and Annex 1) he felt that the limits of liability recommended by the Panel might be too low for acceptance by the United States."

In ANNEX 1, at page 9, the Panel noted:

"1. Article 3 of the Warsaw Convention provides that if the carrier accepts a passenger without a ticket having been delivered he shall not be entitled to avail himself of the provisions of the Convention which exclude or limits his liability. In one country the courts have interpreted this as meaning that the carriar is not entitled to avail himself of the limits if the ticket delivered does not give adequate and timely notice of the fact that the Convention applies to the carriage."

Again, the 1967 American refutation (pages 9, 10):

"5. Contrary to the views stated above, the Member from the United States of America was of the opinion that notice is needed in countries were the Warsaw/Hague system is not applicable to domestic air transportation and where the liability of carriers is generally unlimited. In the United States of America, for example, a very substantial number of people travel frequently on domestic journeys, but quite infrequently on international journeys. Unless substantial parity is achieved between the levels and rules of liability applicable to both foreign and U.S. domestic or air transportation, the need for legible, intelligible and timely notice will continue, so that such passengers will be aware of the exceptional liability limitations

for international journeys and can take appropriate measures to offset their impact.

5.1 The Member from the United States of America considered that past experience demonstrated the need to continue the sanction of the loss of limitation of liability in order to ensure compliance by the carriers with the notice requirements."

As this Court already knows, the Solicitor General of the United States, in his memorandum filed herein, has supported the holdings of the two courts below.

Therefore, we respectfully conclude that the consistent, unswerving and undeviating position of the United States, and all of its departments and agencies has been that the notice contained in the *Lisi* ticket is completely inadequate to bring to the attention of United States' passengers on international flights, the limits of liability and related provisions of the Warsaw Convention, and that the absence of adequate notice results in a loss of the carrier's limitation of liability.

g. *American Public Policy on Carrier Liability Limitations*

Under the law (admiralty and maritime) of the United States, and under the law of the individual states of the United States, it is against public policy for a common carrier of passengers to limit, or to attempt to limit, the amount of the carrier's liability for personal injury or death of passengers incurred through negligence or other tortious conduct. See: 14 Am Jur 2d, CARRIERS, §§ 942 et seq.; 13 CJS, CARRIERS, §§ 629 et seq.; 80 CJS, SHIPPING, § 195 a; 7 New York Jur, CARRIERS, §§ 399 et seq.

With respect to air carriers, the annotation in 13 ALR 2d 340, 341, indicates that any attempted limitation of its

liability to a passenger by an air carrier, by inserting a provision to that effect in the passenger ticket,

"is contrary to public policy and void. Allison v. Standard Air Lines, Inc. (F DC Cal) [1930] US Av 292, affd (CA9th) 65 F2d 668, [1933] US Av 92; Law v. Transcontinental Air Transport, Inc. (F DC Pa) [1931] US Av 205; Curtiss-Wright Flying Service, Inc. v. Glose (CA3d NJ) 66 F2d 710, [1933] US Av 26, 228, cert den 290 US 696, 78 L ed 599, 54 S Ct 132; Conklin v. Canadian-Colonial Airways, Inc., 266 NY 244, 194 NE 692, 38 NCCA 186, [1935] US Av 97, affg 242 App Div 625, 271 NYS 1107.

The American common-law policy of barring a common carrier of passengers from limiting or extinguishing its liability for negligence by contract with the passenger was followed in Curtiss-Wright Flying Service, Inc. v. Glose (CA3d NJ) 66 F2d 710, [1933] US Av 26, 228, cert den 290 US 696, 78 L ed 599, 54 S Ct 132, which excluded the air carrier's attempted limitation of damages to a stated sum, by provisions printed on the passenger ticket covering a seat in an airplane which crashed through the alleged negligence of its pilot, causing the death of its lone passenger. Calling attention to the practice of excluding such limitations in connection wtih land and water transportation, the court stated: "All alike perform the same service, viz., transportation. They are competitors for the same class of business. Every passenger carried by airplane means a passenger less for the railroad or the steamship. Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing-done are identical in result. Since, then, the three stand as, in substance, the same, it re-

mains to inquire whether the defendant was a common carrier, for, if it is, its attempted limitation of an injured passenger to recover full compensation for loss due to its negligence is invalid." The court then went on to point out that an air carrier's holding itself out to the public as performing the things done by a common carrier and its solicitation of the patronage of the traveling public, its advertising of schedules or routes, times of leaving, rates of fare, and its establishment of general rules and regulations, all clearly indicated that it held itself out as a common carrier of passengers and came in direct competition with rail and steamship lines."

We again point out the contrast between American and British law and public policy in regard to this important issue. As was noted in *Oceanic Steam Nav. Co. v. Corcoran* (1925, CA2 NY), F2d 163, 57 ALR 163, at page 168:

"In England, however, a different rule prevails, and it is there settled that a public carrier may exempt itself from liability for its own or its agents' negligence. Henderson v. Stevenson, L. R. 2 H. L. Sc. App. Cas. 470; Parker v. South Eastern R. Co. L. R. 2 C. P. Div. 416—C. A.; Richardson, S. & Co. v. Rowntree [1894] A. C. 217—H. L.; Price v. Union Lighterage Co. [1904] 1 K. B. 412, 6 B. R. C. 119—C. A.; Pyman S. S. Co. v. Hull & B. R. Co. [1914] 2 K. B. 788; Baxter's Leather Co. v. Royal Mail Steam Packet Co. [1908] 2 K. B. 626—C. A.; The Marriott v. Yeoward Bros. [1909] 2 K. B. 987; Cooke v. T. Wilson, Sons & Co. (1915), 85 L. J. K. B. N. S. 888; Hood v. Anchor Line [1918] A. C. 837, 849, 9 B. R. C. 1097—H. L.; Charles Wade & Co. v. London & N. W. R. Co. [1921] 1 K. B. 582; Jones v. Oceanic Steam Nav. Co. (1924) 40 Times L. R. 847, 849."

This British notion of freedom of the passenger to contract away his right of recovery has been carried over, at least in a Canadian case affirmed by the Privy Council, to relationships between an air carrier and its passengers.

In conformity with English law the Canadian Supreme Court in Ludditt v. Ginger Coote Airways, Ltd. [1942] Can SC 406, [1942] 4 DLR 353, [1942] US Av 178, held that a licensed air carrier of passengers may contract out of liability for personal injury to its passengers. The suit was based on personal injuries and loss of baggage caused by defendant's negligence while the plaintiff was a passenger in a plane making a regularly scheduled flight from Vancouver to Zeballos. While the court expressly stated that in Canada "under the existing law and statutes, a carrier of passengers can contract out of the liability which attaches to him, by the use of apt words in the contract or ticket which he issues, provided the conditions for making them binding have been duly complied with," it should be noted that the Supreme Court did not, as appeared in the Court of Appeal decision of the same case, decide whether the air carrier in the present case was a common carrier or not, but was content to base its judgment on the ground that, under the Canadian Transport Act of 1938, the Board of Transport Commissioners may allow the issuance of tickets limiting liability, if it appears that the proper procedure is followed.

On appeal to the Privy Council, the English court of appeals, in upholding the Canadian court, emphasized that although at common law a common carrier of goods was virtually an insurer of the goods and liable at all events except for "acts of God, and of the enemies of the King," the carrier of passengers was only required to carry with due care, and that the common-law freedom to contract was not taken away from carriers of passengers by such

statutes as the Railway and Canal Traffic Act, 1854, which referred to railroad common carriers of goods, or the Dominion Transport Act, which involved a code of provisions relating to traffic, and to tolls and tariffs, to which all licensees under the act must adhere. [1947] AC 233, [1947] 1 All Eng 328, [1947] US Av 1.

V.

In Addition to the United States, Other Participating Governments at Warsaw, Rio and The Hague Evinced Concern for the Passenger. They Noted the Inequality of Bargaining Positions of Airlines and Passengers; Noted the "Adhesion" Nature of the Contract of Carriage; and Supported the Principle That Airlines Would Lose Their Liability Limitation if They Did Not Give Notice to the Passenger.

a. *At Warsaw*

In 1929 at Warsaw, at least some of the participating governments voiced concern for the welfare of international air line passengers and profound interest in their protection. The inequality of the bargaining positions; the nature of the contract of carriage as a contract of adhesion; and the need for notice in order to avoid loss of liability limitation, were articulated frequently.

At the very outset, at Warsaw, the Rapporteur, M. deVos of Belgium (Warsaw Minutes, page 13 et passim), noted the importance of the sanction in protecting the passenger or the shipper. In referring to the work of the Comité International Technique d'Experts Juridiques Aériens ("CITEJA"), he declared (Warsaw Minutes, page 15), as to the passenger ticket and other documents:

> "La chose essentielle, à cet égard, est la sanction, sanction prévue pour les trois documents et qui con-

siste à retirer au transporteur qui transporterait des voyageurs ou des marchandises sans documents ou avec des documents non conformes à la convention, le bénéfice des avantages prévue par la convention."

This may be translated as follows:

"The essential thing, with regard to this, is the sanction, sanction provided for the three documents and which consists in withdrawing from the carrier who would transport passengers or goods without documents, or with documents not in conformity with the convention, the benefit of the advantages provided by the convention."

M. Sabanine of the U.S.S.R. (Warsaw Minutes, page 27), noted:

"Au point de vue économique, au point de vue des relations existantes entre le transporteur et le transporté il n'y a pas d'autre moyen de transport, où l'inégalité entre ces deux Parties au contrat soit plus grande. Déjà le fait même du transport aérien, le fait que l'avion vole, mais ne rampe pas sur terre avec une lenteur déconcertante, agrandit la distance entre les rapports juridiques du transporteur et du transporté. Il faut remarquer ensuite que nous connaissons tous la structure des grandes compagnies d'aéronavigation qui, ou bien dans certains pays sont des compagnies d'Etat ou bien nonobstant leur caractère privé au point de vue formel, sont très prochement liées avec les milieux gouvernementaux et donc sont très influentes et économiquement fortes. Dans ces conditions nous sommes obligés d'appuyer très fortément l'opinion qu'une décision de la présente Conférence, comme quoi les cadres de l'exonération eventuelle du

transporteur deviennent trop larges, serait inéquitable et pourrait influencer négativement le développement des transport aériens au point du vue de leur fréquence. Or, qui de nous désirerait un pareil résultat."

"Si au commencement de ce siècle on parlait encore du droit aérien avec trop de détails en comparaison avec l'état de la technique de l'aviation, maintenant ce serait une faute de sous-estimer les possibilité de sécurité et de commodité, dont dispose et dont disposera de plus en plus le transport aérien et de quitter pour cette cause la voie habituelle et normale de la responsabilité du transporteur, surtout si on estime la grande prépondérance économique et politique qui est du côté de celui-ci."

Translation of the foregoing follows:

"From the economic point of view, from the point of view of the existing relations between the carrier and the traveller, there is no other means of transportation where the inequality between the two parties to the contract are greater. Already the very fact of air transportation, the fact that the plane flies, but does not creep on earth with disconcerting slowness, widens the distance between the juridical relations of the carrier and the traveller. One must note further that we all know the structure of the large air navigation companies which in certain countries are either state companies, or in spite of their private character from a formal point of view, are very closely bound to the governmental circles, and are therefore very influential and economically strong. In these conditions we are obliged to support very strongly the opinion that a decision of the present conference whereby the framers of eventual exoneration of the carrier become too wide, would be inequitable and could nega-

tively influence the development of air transportation and from the viewpoint of their frequency. Now, who among us, would wish such a result?"

. . . .

"If at the beginning of this century one still spoke of air law with too much detail in comparison with the state of the technique of aviation, now it would be a mistake to underestimate the possibilities of security and comfort at the disposal, now and forever more, of air transportation and to leave, for this reason, the usual and normal path of the liability of the carrier, especially if one values the great economic and political preponderance which is on his side."

Such juridical thoughts as to the protection of the travelling public were strenuously voiced from non-communist sources as well. Thus, the spokesman for Switzerland (Warsaw Minutes, page 103) stated:

M. PITTARD—(Suisse)—"Nous devons donner au public des règles qu'il connaisse. Si vous dites: c'est une question entre les compagnies de navigation aérienne et le public, au point de vue administratif, c'est très simple, mais tous les juristes vous diront: nous devons éclairer le public, il ne faut pas qu'il soit obligé d'aller trouver les compagnies de navigation aérienne pour leur demander: comment faites-vous? Le public ne va pas aller trouver la compagnie de navigation aérienne pour luit dire: donnez-mois vos conditions générales, que je voie si je suis protégé!"

Translation ensues.

"We must give the public rules that it knows. If you say: it is a question between the companies of air navigation and the public, from an administrative

point of view, it is very simple, but all jurists will tell you: we must enlighten the public, it should not have to go to the companies of air navigation to ask them: how do you do it? The public is not going to go to the company of air navigation to say: give me your general conditions, so that I can see if I am protected."

We have already noted, above, the observations of Signor Giannini on behalf of Italy (Warsaw Minutes, page 32). For convenience, we repeat the translation:

"In these conditions, when we find ourselves facing organized interests like those of the ship owners and of non-organized interests, like those of the passengers, we feel that the latter should not be forgotten, otherwise we do not have the harmony of interests which must be guaranteed.

"Consequently, as general directives of the Italian Delegation I must say that we are not prepared to accept any measure of favor or of particular indulgence toward the ship owners. This means that for what touches the interest of air navigation, that is of national interest, yes; for what is privilege or favor, no."

Also, in discussing another article, Signor Giannini (Warsaw Minutes, page 66), pointedly remarked: "Dans cet article comme pour les autres, la Délégation italienne estime que tout ce qui constitue pour le transporteur aérien un privilège exagéré ne doit pas être accepté."—"In this article as in the others, the Italian delegation considers that everything that constitutes an exaggerated privilege for the air carrier must not be accepted."

M. Pierre Flandin, for France (Warsaw Minutes, page 28), declared:

"Il est clair que nous devons, dans une convention qui tend à être universelle, établir des règles qui soient une garantie, qui constituent une garantie pour l'usager et ce serait, à mon sens, commettre une grave erreur que de considérer qu'une législation comme celle que nous voulons créer doit être adaptée seulement aux conditions actuelles du moment: il faut tenir compte de l'évolution probable d'un moyen de transport tout nouveau, des garanties de sécurité de plus grandes qu'il offrira et ne pas créer à son encontre une différence trop grande qui inciterait l'usager, soit le passager, soit le commercant qui confie des marchandises au transporteur, à ne plus emprunter la voie aérienne, parce qu'il serait moins garanti que sur les autres voies. Or, parallèlement à une législation rsetrictive de la responsabilité comme celle dont je viens de parler à l'instant, que s'est-il passé dans les pays?"

The translation:

"It is clear that we must, in a convention which tends to be universal, establish rules which should be a guaranty, which constitute a guaranty for the user, and it would be, in my opinion, to commit a grave error were we to consider that a legislation like the one we want to create be adapted only to actual conditions of the moment; one must take into account the probable evolution of an entirely new means of transportation, of the guaranties of security, larger and larger, that it shall offer, and not create against it too large a difference, which would induce the client, either the apssenger, or the businessman who entrusts his merchandise to the carrier, not to use the airways, because he would be less covered than by other means of transportation."

b. *At Rio*

Expressions of concern for the passenger, stressing the inequality of his position, abounded at the Rio Meeting in 1953. The Delegate of France, M. Garnault, (Rio Minutes, pages 174, 175) stated:

> "Article 3(1) of the Working Group's text provided that the passenger ticket must include a statement to the effect that the carriage was subject to the rules relating to liability established by the Convention. This was an essential provision. The contract of carriage was, particularly in regard to the passenger, a "contrat d'adhésion" the terms of which could not be discussed. The passengers were not familiar with the detailed provisions governing their travel by air. The least that could be told to them was that they were travelling under a system of limited liability, and not under a system of complete liability, as would be the case under the majority of legislations governing other modes of transport. If they did not receive this notice, they would risk being deceived in regard to the conditions under which they were taking the risk of a trip by air, and this was a serious matter. The French Delegation felt that there should be a particular in the ticket concerning, at least, the provisions of the Convention which limited the liability of the carrier. It also felt that a sanction should be applied to the carrier in the case of the omission of this particular, and this sanction should be that the carrier could not claim limited liability, because it left the other party to the contract in ignorance as to the existence of limited liability."

Later, specifically referring to the "sometimes small print" used by the international air carriers in their passenger tickets, he added:

"Mr. Garnault (France), replying to Mr. Cooper (IATA), pointed out that if the French Delegation sacrificed logic, it did so in order to take into account the practical facts of the problem. The passenger who took an aircraft received a ticket which included numerous particulars, which a person would not be tempted to read unless he were suing on them, but what could be observed was that, in spite of the sometimes small print, these causes were perfectly studied by those who worked for the carriers, so much so that everything having been prepared and written, one could not possibly be deceived and it was hardly likely that the servants or agents would commit blunders.

The practical difficulty which the proposals of Canada and France wished to overcome was to draw the attention of the passenger to the fact that he was subject to special rules of liability which determined his rights. It would even be necessary that, in the future, it be brought out in a better way on the passenger ticket that the ticket was a contrat d'adhésion, for, otherwise, the passenger might not take out supplementary insurance if he did not know that he was travelling under rules providing for limited liability. The French Delegation, therefore, asked that the liability of the carrier be unlimited, as was the case for an ordinary carrier carrying out transport under common law rules, when it was not shown on the passenger ticket that the carriage was subject to the rules relating to liability established by the Convention."

At a still earlier session of the Rio meeting, The French Delegate, noting that the contract of carriage was a contract of adhesion, had stated (Rio Minutes, page 54):

"The formalities with which the contract of carriage should be accompanied had the aim of enabling the

parties to this contract to prove its contents. On the other hand, it could not be admitted that, in a *contrat d'adhésion,* the carrier could be free to define the form of this contract."

c. *At the Hague*

Concern for the passenger's welfare and for giving him information as to his rights predominated at The Hague in 1955. In addition to the ideas articulated by Mr. Calkins on behalf of the United States, discussed above, delegate after delegate stressed the need for complete enlightenment of the air travelling public. Mr. O'Connor of the Ireland Delegation argued often and strongly, among others.

Thus (Hague Minutes, pages 69, 70), Mr. O'Connor said:

"it seemed inevitable that the interest of the public must at least slightly predominate, if only for the reason that the public was normally less better informed in matters of this kind than the airlines. Therefore, he had voted against the entire deletion of Articles 3 to 11, which would leave the position wide open. In the event of deletion, no matter what good intentions the airlines might have, it seemed inevitable that the public might suffer."

"What was the position of the passenger, who knew nothing whatever about the conditions of liability? Normally he might wish to cover himself in some manner additional to the coverage provided by the Convention. Consequently, it was essential that the passenger should be given some information as to the situation. It seemed absurd to his Delegation to suggest that such information could be conveyed by saying on the ticket that the Warsaw Convention, if it covered

the journey, applied to the journey. Yet, this was an interpretation of the suggestions which had been made in the Conference concerning the notice. It should not be beyond the capacity of, say, ICAO and to some extent of IATA to aid in the dissemination of the information. His Delegation was attracted by the United States proposal, which seemed to attempt to tell the passenger most of what he wanted to know."

"It had been stated that it was ridiculous to apply to a simple omission the sanctions which were already applied in the Convention in the case of wilful misconduct. But, when an omission left the passenger completely in ignorance of his position, the situation was, if not quite as bad as in the case of wilful misconduct serious for the passenger. Consequently, the sanctions should apply in the case of such an omission. It had been said that the sanction was harsh because the term 'wilful misconduct' must necessarily apply to something of a very high order for unlimited liability to apply. But, this was not so, because the Courts of the country concerned would decide what the actual liability would be and the liability so determined must be taken to be reasonable."

Then, at page 122, he continued:

"in the case of the notice, in order to establish a fair balance between the public interest, as represented by the passengers, and the private interest, as represented by the carriers, one had to weigh the balance a little in favour of the passenger who was in an inferior position in relation to the knowledge of the law governing the carriage. The proposals before the meeting merely paid lip-service to the principle that the passenger should have knowledge of the Conven-

tion. These proposals tried to make the passenger aware of the existence of the Convention, but made no effort to tell him what the Warsaw Convention covered, or in what circumstances it would operate. Only the United States proposal attempted to go a little in that direction."

Mrs. Zalka of Hungary (Hague Minutes, page 58) noted "the interest of the passengers, which was an interest which the Convention should defend, since this was an interest of the citizens of the States who were represented at the Conference."

M. Garnault noted, on behalf of France (Hague Minutes, page 88):

> "The Convention applied especially to the extent that it implied on the part of the passenger, the acceptance of a regime of limited liability of the carrier. When this element was not included in the contract of carriage or was not sufficiently brought out in the contract, the consent of the parties was to that extent not manifest on the question of limitation of liability. In that event there would be a return, at least in certain countries, to a common law solution whereby the carrier was entirely liable to give compensation for damage caused during the carriage."

He then went on (Hague Minutes, page 126):

> "The non-inclusion of a provision for sanctions would be even more curious in view of the fact that the Observer from the IUAI had pointed that if the sanctions were not included, the Courts might perhaps, apply them. The sanction should apply in cases where there was a flagrant neglect on the part of the carrier to give a notice to the passenger."

The delegate from Spain, Señor Gómez Jara (Hague Minutes, page 90) spoke straight to the point:

> "it was entirely natural and logical that the Convention should include a sanction of unlimited liability when the passenger was not given notice that the carriage in question was subject to a regime of limited liability. It was entirely natural that the Convention should include a procedure to ensure that the ticket would contain the fundamental condition to the effect that the carriage was subject to a limitation of liability. The basis of the Warsaw Convention was to give the carrier the benefit of the limitation of liability."

. . . .

> "Other speakers, including Messrs. Calkins and Garnault, had said that the Warsaw Convention had a contractual basis and that in this contractual basis had to be included the fundamental condition or purpose of the Convention which was the limitation of liability. If the Convention reduced the rights of the passengers by a limitation of liability, it was absolutely necessary that, at the time the contract was entered into, the passenger know that there might be this limitation of liability."

He reiterated (Hague Minutes, page 129):

> "The fundamental element of the Convention was that it restricted the rights of the passenger by limiting the liability of the Carrier. Therefore, it was only just and logical to draw the attention of the passenger to the possible limitation of the carrier's liability."

VI.

The Position of Air Carriers Has Completely Changed Since the Fledgling Days of 1929, and the Warsaw Convention Must Be Considered in Light of Modern Prevailing Conditions.

a. *The Radical Changes Since 1929*

The position of air carriers in the 1925-1929 period is described in "The United States and the Warsaw Convention", by Lowenfeld and Mendelsohn, in 80 Harvard Law Review. The authors recite the following facts (80 Harvard L Rev at page 498):

> "The Warsaw Convention[2] was the result of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA) created by the Paris Conference. Civil aviation at that time was still in its infancy. The total airline operations in the five-year period 1925 to 1929—in domestic as well as foreign travel—was only 400 million passenger miles. The fatality rate was 45 per 100 million passenger miles.[3] The larger airlines could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. The most advanced and popular United States aircarft, the Lockheed Vega, which carried six passengers and a pilot, had a cruising speed of about 120 miles per hour and a range of about 550 miles. Though the airplane had been invented at roughly the same time as the automobile, its coming

[2] 137 L.N.T.S. 11 (1929).

[3] This compares with the rate of 0.55 fatalities per 100 million passenger miles in 1965. 1965 ANNUAL REPORT OF THE ICAO COUNCIL TO THE ICAO ASSEMBLY 13.

of age as a common means of transportation lagged at least a generation or more behind. Still, by 1929, international civil aviation was on the threshold, and the planners at Warsaw were prepared to look ahead."

Then, after discussing the casual mode of adherence by the United States to Warsaw (80 Harvard L Rev. at page 502) " . . . . the President submitted the Treaty to the Senate, and on June 15, 1934, without debate, committee hearing, or report, the Senate gave its advice and consent by voice vote. The United States deposited its instrument of adherence on July 31, 1934, and the President proclaimed the Treaty ninety days later."), the authors, in examining the debates concerning revision of Warsaw that started almost immediately, noted, with citation of authority even including Major Beaumont, at 80 Harvard L. Rev. page 504,

"And some persons suggested that there was no longer any reason to accord special protection to airlines, or at least the degree of special protection that was required in 1929.[26]

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[26] *See, e.g.,* Beaumont, *Liability of International Air Carriers,* 97 L.J. 643 (1947); Rhyne, *International Law and Air Transportation,* 47 MICH. L. REV. 41, 54-61 (1948)."

Hence the steadily improving position of air carriers engaged in international flights was noted even in the 'thirties and in the 'forties.

After mid-century, the United States repeatedly stressed how different from what it was in 1929, and how improved, financially and otherwise, was the status of these air carriers. At Rio in 1953, the Delegate of the United States remarked:

" . . . aviation had become sufficiently of age so as no longer to require special treatment to the degree that

was now accorded it by the present limits of liability. There was a tremendous difference in the state of aviation in 1929 and its state today. The amount of traffic carried in 1929 was almost insignificant. He had no information as to whether insurance could be obtained at that time. He believed that most life insurance policies, at that time, excluded all aviation risks as a matter of common concern and that it was almost, if not entirely impossible, for airlines to obtain insurance. Consequently, in 1929, it was very necessary for the development of international aviation generally, to accord it a special privilege that would enable it to develop and, at the same time, limit the risks to an amount which aviation at that time could pay.

In comparison with that early period, aviation had today, definitely become of age. The risks of air transport were very close to those of surface transport. In domestic United States transportation over the period of last year, the rate per 100,000,000 passenger miles was identical to the death rate over the preceding three years of transportation by rail, that is, the figure of 35 persons killed per 100,000,000 passenger miles. . . .

Again, to give further statistics in regard to the development of aviation, he stated that more passengers had come by air to the United States ports during the course of a year than had come by ship. Last year, the airlines of the United States operating domestically had carried 25% more passengers than had been carried by first-class rail, and, even taking in all rail transportation, the amount of passenger traffic in the United States amounted to 40% of the total traffic by rail.

Financially, equally great strides had been made. It was a matter of interest that, of all the carriers in the United States, whether bus, road, railroad, sea or air, the three leading carriers from the point of view of gross passenger revenues had been the airlines. That was a remarkable record which indicated complete acceptance of this method of transportation."

We have noted elsewhere the strong statement by the United States Delegate at the 1966 ICAO meeting in Montreal (Montreal Minutes, pages 5, 140) about the potent later-day position of the air carriers. But the United States was not alone in recognizing this factor at Montreal. Witness the observations of the President of the ICAO Council (Montreal Minutes, pages 1, 2):

"When the Warsaw Convention and The Hague Protocol were prepared, one of the most important, for the establishment of the limits of liability, was the need to protect the air transport industry. The situation has changed in the sense that air transport could today hardly be called an infant industry. The economic situation of many airlines is very solid and the size of their operations is impressive: • • • •

At the same time, the ever-increasing number of air passengers requires that more attention be given to the public. There are many who feel that both at Warsaw and at The Hague, the predominant voice was that of the air carriers and that the passengers were not well taken care of.

In this gathering of delegates from Governments, there is no need to emphasize that the travelling public must be adequately protected. Adequately means not only a reasonable financial compensation but a system that will permit receiving that compensation with a minimum of delay."

The Delegate of the Republic of China (Montreal Minutes, page 22) agreed:

> "The situation today has changed from that in 1929 or 1955 when it was necessary to protect the air transport industry at its infant stage."

So did the Delegate of Belgium (Montreal Minutes, page 146):

> "Through its developing techniques, civil aviation has become a safe and economical means of transport which can no longer claim the protection which is very rightly granted to infant industries."

b. *The Warsaw Convention Must Be Construed as a Whole in the Light of Presently Existing Conditions of International Air Travel*

Because most of the foreign and domestic air carriers are amenable to jurisdiction and venue in New York, the great bulk of the litigation and of the reported decisions about the Warsaw Convention has stemmed from the federal courts and the state courts in and of New York. The District Courts for both the Southern and Eastern Districts of New York are thoroughly versed in the ways of Warsaw, as is their direct appellate reviewing tribunal, the Second Circuit. Equally knowledgable and experienced in dealing with this Convention is the New York Court of Appeals. We respectfully urge to this Court that the considered judgments of these tribunals are entitled to great weight in determining Warsaw construction problems such as the one presently before this Court—the first time, by the way, that the Warsaw Convention has ever had, here, a full-scale review on the merits of a case.

A leading New York case developing fully principles of treaty construction and interpretation as to Warsaw is

Eck v. *United Arab Airlines* (1964) 15 NY2d 53, 255 NYS2d 249, 203 NE2d 640, 6 ALR3d 1260, where the court wrote (15 NYS2d at pp. 58-60, 255 NYS2d at pp. 251, 252, 6 ALR3d at pp. 1266, 1267):

"The crux of the problem is that the Appellate Division reached its conclusion by applying mechanically the *literal* translation of a phrase without an analysis of the treaty. The court overlooked the canon that, when a treaty is invoked, *what is to be applied are its principles if its purposes are to be observed presently as in the past.* (Valentine v United States ex rel., Neidecker, 299 US 5, 10, 57 S Ct 100, 81 L ed 5, 9 [1936]; Maximov v United States, 373 US 49, 54, 83 S Ct 1054, 10 L ed 2d 184, 188 [1963].) The reasoning which supports a strictly literal reading of the phrase might not have done violence to the overall scheme and design of the Convention under the conditions existing when the treaty was drafted. At that time[2] it would have been in harmony with the methods under which the carriers were operating and with the objectives of the Convention. (Strother v Lucas, 12 Pet [37 US] 410, 428, 9 L ed 1137, 1144 [1838].) Now, however, almost a half century later, when the carriers have radically changed their methods of booking passage, the whole scheme of the treaty in relation to international air travel makes it imperative to analyze this self-executing treaty in assigning meaning to any part of it. In doing this it must be recognized that the literal wording of one particularly applicable section of

[2] When the convention was originally drafted in 1926, Charles Lindbergh had not flown to Paris. When it was first adopted Air France had two overseas flights, one from Paris to London and the other from Marseilles to Tunis. Pan American flew from Key West to Havana. The China Clipper flight on Pan American did not take place until 1935, after the United States had become a signatory to the Warsaw Convention in 1934.

the entire treaty should not set the limits of our interpretive examination . (Choctaw Nation of Indians v United States, 318 US 423, 432, 63 S Ct 672, 87 L ed 877, 883 [1943].) The proper procedure now is to examine the treaty as a whole, along with its history, and, in particular to look into the problems which it was intended to solve.

This process displays the purposes underlying the treaty's adoption. The over-all principle of the Convention was one of allowing only a regulated burden to be the responsibility of the then struggling carriers. The purposes were to *provide uniform rules of limitation concerning the liability* of international air carriers to their passengers and to *provide a uniform remedy for these passengers* to the extent that this remedy would not burden the carrier more than the Convention provisions allowed. These principles were expected to be operative with respect to conditions developing after the enactment of the Convention. * * * *

Allowing this suit does not run contrary to the convention's provisions. Rather it gives a meaningful effect to the underlying principles by applying them to the realities of international air travel in these times. In 1926 these principles were put into a specific written formula which was meant to deal not only with the circumstanees of an infant industry in that era but also accomodate itself consistently to changing conditions as the industry grew."

On or about the last of December, 1967, the New York Court of Appeals decided the important case of *Egan* v. *Kollsman Instrument Co. and American Airlines, Inc.*, No. 584 on its Docket. The decision is so recent, at date of writing of this brief, that we are unable to furnish the citation in either NY2d Reports or in NYS2d. But because the

case involved the exact question now before this Court, we beg this Court's indulgence in quoting the opinion of Chief Judge Fuld for a unanimous New York Court, further noting that such unanimous Court deliberately followed the decision herein, in *Lisi*, of the two federal courts below *with full knowledge and mention of the fact that certiorari had been granted herein*, thus indicating the considered judgment of the New York Court that what the Second Circuit has held was correct:

> "This brings us to the plaintiffs' further argument that, even if the Warsaw Convention applies, the carrier is not entitled to invoke the provisions limiting its liability because the ticket delivered to Mrs. Seiter did not give sufficient notice that the rules of the Convention relating to the limitation of liability were applicable.
>
> Under article 3(1) (e) of the Convention, an airline is required to deliver a passenger ticket which contains a 'statement that the transportation is subject to the rules relating to liability established by this convention.[4] The ticket before us did contain, in footnotes

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[4] Article 3 provides:

'(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of

> transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.'

on the several coupons, such a statement (*supra*, pp. 1-2) but, as is apparent from inspection, it is in such exceedingly small and fine print as almost to defy reading..[5] Thus, although there was literal compliance

[5] One court has described the notice in this way (*Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F Supp 237, 243, affd. 370 F 2d 508):

> 'The footnotes printed in microscopic type at the bottom of the * * * coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of "Conditions of Contract" crowded on [the outside back cover], are both unnoticeable and unreadable.' Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.'

with the prescription of article 3, the question arises whether such compliance satisfies the Convention's demands when viewed in the light of its overall purposes. We do not believe that it does. In our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention.

In support of its argument to the contrary, the respondent points to *Ross* v. *Pan American Airways* (299 N.Y. 88, *supra*). The ticket there under consideration, not too unlike the one before us, had been delivered not to the passenger personally but to a third person who had been in charge of all arrangements up to the time of the plane's departure. In holding that delivery to the latter was sufficient, the court observed that, when a ticket provided for international transporta-

tion, the Convention applied 'by its own terms and not because the parties agreed' and that the carrier need show no more than delivery of the ticket (p. 97). As already indicated, the sole question presented concerned the adequacy of such delivery. No argument was made by the passenger as to the form of the ticket or the readability of the statement as to liability. And, indeed, in 1964, 15 years later, the court decided *Eck* v. *United Arab Airlines* (15 N.Y. 2d 53) and, despite the carrier's strong reliance on the rationale and language of *Ross,* expressly rejected a 'strictly literal reading' of the Convention or any of its provisions. Remarking the changes which had occurred in the years since the Convention had been drafted and stressing the vital canon of construction that, when a treaty is invoked, '*what is to be applied are its principles if its purposes are to be observed*' (emphasis in original), the court declared (p. 59):

> 'The reasoning which supports a strictly literal reading of the phrase might not have done violence to the over-all scheme and design of the Convention under the conditions existing when the treaty was drafted. At that time it would have been in harmony with the methods under which the carriers were operating and with the objectives of the Convention. [Case cited.] Now, however, almost a half century later, when the carriers have radically changed their methods of booking passage, the whole scheme of the treaty in relation to international air travel makes it imperative to analyze this self-executing treaty in assigning meaning to any part of it. In doing this it must be recognized that the literal wording of one particularly applicable section of the entire treaty should not set the limits of our interpretive examination.'

And, even more recently, the United States Court of Appeals for the Second Circuit, confronted with the precise problem now before us, decided that a ticket, containing a statement (as to the carrier's liability) virtually identical in content and form with that in this case, failed to give passengers the notice required by the Convention. (See *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F 2d 508, cert. granted 36 USLW 3189.) After observing out that '[t]he Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier,' the court, in an opinion by Judge Kaufman, went on to say that 'the *quid pro quo* for the one-sided advantage is delivery to the passenger of a ticket * * * which give[s] him notice' of a 'very substantially' limited liability and affords him 'the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit' (pp. 512-513). Pointing out that the statement on the tickets under consideration was printed in such a manner as to be virtually unnoticeable and unreadable, the court concluded, as already noted, that the tickets did not give the passengers the required notice.

Other interpretations of article 3 have also taken into account the fact that a traveler today is likely to undertake international travel quite casually and without realizing the drastically limited protection they are receiving when compared to that provided by domestic flights. (See *Mertens* v. *Flying Tiger Lines, Inc.*, 341 F 2d 851 [2d Cir.]; *Warren* v. *Flying Tiger Lines, Inc.*, 352 F 2d 494 [9th Cir.]; but see *Seth* v. *BOAC*, 329 F 2d 302, 307 [1st Cir.].) In the *Mertens* case (341 F 2d 851, *supra*), the court read article 3 'to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to

take measures to protect himself against the limitation of liability' (p. 856) and held that the requirement was not met by reason of the fact, among others, that the ticket delivered was 'printed in such a manner as to virtually be both unnoticeable and unreadable' (p. 857). In addition, the Civil Aeronautics Board in 1963 adopted a regulation requiring (1) that the statement as to limitation of liability follow the far more clear and specific language specified by the Board; (2) that it 'be printed in type at least as large as ten point modern type [as contrasted with the 4½ point type in this case] and in ink contrasting with the stock'; and (3) that a similar statement be placed at all ticket counters in letters at least one-fourth of an inch high (14 Code Fed. Regs., § 221.175).[6]

[6] The language of the statement which was mandated by the CAB was similar to that provided for in the amendment to article 3 appearing in the so-called Hague Protocol to the Convention executed in 1955. (See 3 CCH Aviation L. Rep. ¶27,106.) This Protocol was never ratified by the Senate, apparently because its most significant feature, increasing the maximum liability to $16,000 was considered inadequate. It is of more than passing interest that in 1965 our Government in a Notice of Denunciation declared that it opposed the Convention's low limits on liability and indicated an intention to withdraw from the Convention unless an agreement were reached (among the world's international air carriers) to raise the limit to $75,000 and that in May of 1966 such an agreement was executed. (See 3 CCH Aviation L. Rep. ¶27,130; The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation, 32 J. Air L. & Com. 243.)

These decisions and regulations are suggestive of a national policy requiring that air carriers give passengers clear and conspicuous notice before they will be permitted to limit their liability for injuries caused by their negligence. An examination of the ticket forms which the respondent used, in the light of that policy, can only lead one to conclude that Mrs. Seiter was not sufficiently apprised of the consequences which

would result from the fact that her flight happened to carry her outside of the United States. Despite the fact that the Convention was applicable to her journey, the carrier's failure to give the requisite notice prevents it from asserting a limitation of liability. Accordingly, the plaintiff's motion to dismiss the third affirmative defense should have been granted."

As did the two courts below, the New York Court of Appeals held that *as a matter of law* a ticket of the type herein involved is insufficient to permit interposition by a carrier of a defense based upon Article 22 of Warsaw. The decisions of these three courts should completely dispose of petitioner Alitalia's somewhat collateral issue that a jury question was raised as to the "notice" in the *Lisi* tickets—an issue, by the way, that the Second Circuit held had been waived.

The rule that treaties are to be construed as a whole, with effect given to all their provisions if possible, with the provisions construed in pari materia, is supported by many decisions of this Court and those of other courts. See *Geofroy* v. *Riggs* (1890), 133 US 258, at p. 270, 33 L ed 642, at p. 646, 10 S Ct 295 ("It is a rule, in construing treaties as well as law, to give a sensible meaning to all their provisions if that be practicable"); *Sullivan* v. *Kidd* (1920) 254 US 433, at p. 439, 65 L ed 344, at p. 347, 41 S Ct 158 ("all parts of a treaty are to receive a reasonable construction, with a view to giving a fair operation to the whole. 5 Moore, International Law Dig. 249."); *Hamilton* v. *Erie R. Co.* (1916), 219 NY 343, at p. 353, 114 NE 399, writ of error dism in 248 US 369, 63 L ed 307, 39 S Ct 95 ("The entire provisions of the treaty relevant to the inquiry are to be studied");

52 Am Jur, TREATIES, § 28; 87 CJS, TREATIES, § 13a, p. 937, nn. 92, 93.

In *Sullivan* v. *Kidd, supra,* this Court construed the treaty between Great Britain and the United States of March 2, 1899, relating to the tenure and disposition of real and personal property, and, in order to reach a proper construction and application of Article IV thereof relating to the applicability of the treaty to the (then) Dominion of Canada, considered the significance of Article VI relating to termination by notice.

Similarly, in the instant case, the proper construction and application of Warsaw, Articles 3(1)(e) and 3(2), depend upon giving proper effect to such a cognate provision as the clause of Article 22(1) that "the carrier and the passenger may agree on a higher limit of liability." Now, unless an intending passenger were given notice in his ticket—in language that he could see, read and understand—that his flight was subject to the limits of liability stated in Article 22 of Warsaw but that he could make a contract with the carrier for a higher limit, how could the provision as to contract for a higher limit in any way be meaningful? The position taken by petitioner Alitalia and those *amici* supporting that position requires that the provision as to contract for higher limit be thrown out the window. Such a position is completely inconsistent with the rule that a treaty should so be construed as to give effect to every provision.

VII.

The Original Greek Proposal Relating to the Sanctions in Article 3 of Warsaw, Does Not Support Petitioner's Position, Since It Did Not Relate to Limitation of Liability and Would Not Have Eliminated the Sanctions.

In various briefs supporting the position herein of petitioner Alitalia, an attempt has been made to build a "legislative history" argument to the effect that a proposal-amendment submitted by the Hellenic (Greek) delegation before the 1929 Warsaw Conference took place, resulted in the deletion from Article 3(2) of a sanction for omission of particulars from the passenger ticket, from the final Warsaw draft. Although the exact proceedings are somewhat obscure in the minutes, it is clear from a reading of this Hellenic proposal that the above argument is unfounded. The Hellenic proposal, as shown below, did not relate to limitation of liability, and it would not have resulted in complete elimination of sanctions. Indeed, it appears that the dropping of sanction from Article 3(2) was accomplished without any discussion of the actual terms of the Hellenic proposal which is now cited as the basis for such elimination.

Without any reading or disclosure of the terms or details of the Hellenic-proposed amendment, it was stated that that proposal was as follows (Warsaw Minutes, page 101):

> "Mais en présence d'une observation de M. le Délégué hellénque, qui est la suivante: le dernier alinéa de l'article édicte les sanctions en cas d'absence de ce billet de passage, ou lorsque le billet de passage ne

contient pas toutes les mentions indiquées, dès lors la sanction est trop sévère lorsqu'il s'agit d'une simple omission, d'une négligence d'un employé de la compagnie de transports — la commission s'est ralliée à ce point de vue et, dans le dernier alinéa, elle a supprimé les mots:

„... ou si le bulletin ne contient pas les mentions indiquées ci-dessus'."

This may be translated:

"But in the face of an observation by the Hellenic Delegate, which reads as follows: The last paragraph of the article decrees the sanctions in case of absence of the passenger ticket, or when the passenger ticket does not carry all the particulars indicated, from then on the sanction is too harsh, when there is a simple omission, a negligence of an employee of the company of transport — the commission has agreed with this viewpoint, and in the last paragraph, it eliminated the words: or if the document does not contain the above particulars."

The "commission" may have "agreed"; but, as we show hereinafter, the above language goes much further than the Hellenic proposal. Then, after no one wanted the floor (Warsaw Minutes, page 130), the "commission's" Article 3 was voted on and adopted without any discussion at all. That is how Article 3(2), of Warsaw, as worded, slipped into the Warsaw Convention.

The original Hellenic (Greek) proposal is contained in Warsaw Minutes (page 196, 197):

REPUBLIQUE HELLENIC.

Article 3 — § 4.

"Conformément à l'article 22 du projet, dans le cas d'un accident, le transporteur peut dègager sa responsabilité s'il prouve que lui et ses préposès, ont pris les mesures raisonnables pour éviter le dommage, ou qu'il leur était impossible de les prendre.

Toutefois, d'après l'article 3, le transporteur pend cet avantage, si le billet de passage ne contient pas les mentions indiquées dans cet article.

Il se peut, en effet, que par une simple négligence le transporteur ait omis de mentionner dans le billet de passage le lieu de l'émission, ou le poine de départ, ou son nom et son adresse; ou mème qu'il conserve dans le billet son ancienne adresse, ou enfin qu'il ne signale pas un arrêt intermédiarie.

Ce sont là, en général, des omission sans grande importance pour la partie, parce qu' il est commu om facile à établir que le billet a été émis et le départ a eu lieu de l'aérodrome de telle ville, que l'avion appartient à telle compagnie, ou parce que l'arrêt intermédoaire peut être sans intérêt pour le contractant.

On peut se demander pourquoi une telle omission, sans importance pour la plupart des cas, devrait entrainer, dans tous les cas, une sanction aussi grave que celle prévue par l'article 3, paragraphe 4.

Si l'omission est sans intérêt pour l'autre partie et si elle ne lui cause aucun dommage, comment pourrait-on justifier cette sanction sévère à la charge du transporteur?

Cette sanction est justifiée seulement dans le cas où l'omission d'une mention aurait engendré un dommage

au passager, comme il peut arriver dans certaines circonstances.

Mais qui jugera s'il y a dommage à cause de cette omission à l'autre contractant, et si ce dommage est tel qu'il faut faire perdre au transporteur la facilité de sa dégager par la preuve qu'il a fait le nécessaire pour éviter l'accident? Il n'y a certes que le tribunal, saisi de l'affaire, qui pourra faire cette appréciation.

C'est pour ces raisons que nous proposons de modifier l'alinéa 4 de l'article 3 du projet comme suit:

„Si, pour un tranport international, le transporteur accepte le voyageur sans qu'il ait établi un billet de passage, le contrat de transport n'en sera pas moins soumis aux régles de la présente convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout on en partie sa responsabilité directe ou dérivée des fautes de ses préposés.

„Si le billet de passage me contient pas une des mentions indiquées ci-dessus, le transporteur sera privé de ce droit dans le cas, où, d'après l'appréciation du tribunal, un dommage serait causé de ce fait à l'autre partie".

Pour les mêmes raisons il faudrait modified dans le mêmes sens l'alinéa 7 de l'article 4 pour le bulletin de bagages et l'article 17 pour la lettre du transport.

A fair translation ensues:

Hellenic Republic

Article 3 — Section 4

"In conformity with article 22 of the draft, in case of an accident, the carrier can set aside his liability if he proves that he and his agents have taken reasonable

measures to avoid the damage, or that it was impossible for them to take any.

However, according to article 3, the carrier loses this advantage if the passenger ticket does not contain the particulars indicated in this article.

It may happen, in fact, that due to a simple neglect, the carrier has omitted to mention in the passenger ticket the place of issue, or the point of departure or his name and address; or even that he keeps on the ticket his old address, or, finally that he does not point out an intermediate stopping-place.

These are, generally, omissions of no great importance for the most part, because it is known, or easy to establish where the ticket was issued and that departure took place at the aerodrome of such town, that the plane belongs to such company, or that the stopping place may be of no interest to the contracting party.

One may ask why such an omission, of no importance in most cases, should entail, in all cases, such a serious sanction as that provided by Article 3, paragraph 4.

If the omission is of no interest to the other party and causes no damage, how can this severe sanction of the carrier be justified?

This sanction is only justified in case the omission of a particular would have caused a damage to the passenger, as it may happen under certain circumstances.

But who shall judge if there is damage, because of this omission, to the other contracting party, and if this damage is such that the carrier must lose his possibility of clearing himself by proving that he has done everything possible to avoid the accident?

Certainly it shall only be the court before which the case is brought which shall be able to give an appreciation.

For these reasons, we propose to change paragraph 4 of article 3 of the draft as follows:

'If, for an international transportation, the carrier accepts the passenger without a passenger ticket having been established, the contract of transportation shall nevertheless be subject to the terms of this Convention, but the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude all or part of his liability, direct or derived from the faults of his agents.

If the passenger ticket does not bear one of the above mentioned particulars, the carrier shall be deprived of this right, in case, according to the appreciation of the court, a damage has therefore been caused to the other party."

For the same reasons, paragraph 7 of article 17 should be changed along those lines for the baggage check and article 17 for the waybill'.

Two important facts emerge from a careful reading of this original Hellenic proposal, neither of which lend any support to the position of petitioner Alitalia. In the first place, the proposal is concerned with the complete loss of a valid legal defense to liability, for failure to include certain particulars in a passenger ticket. This goes far beyond loss of an arbitrary limitation on liability, which the Greek proposal does not even mention. The Hellenic concern was with a carrier's loss of a defense even though such carrier might be able to sustain the heavy burden of proving that it had done everything possible to avoid an accident. This Greek fear of loss of such a valid defense

was somehow colored into a purported elimination of a sanction precluding mere limitation upon liability.

In the second place, the Hellenic proposal did not seek to eliminate the sanction altogether, but would have allowed a sanction where the court found damage to a passenger caused by omission of particulars in the ticket. Presumably, this would cover a situation where a passenger failed to purchase flight insurance because of lack of notice of liability limitation—the very basic policy underlying the decision in the *Lisi* case below.

This argument submitted by petitioner points up one of the basic vices of Warsaw: the attempt to regulate private legal rights of passengers and carriers by an international treaty. Since the United States did not even participate in drafting of the treaty, its origins and true drafting history are even more obscure than would normally be the case. For further striking illustrations of this situation, see the attempt of the Fifth Circuit panel to divine the drafting history of Warsaw in *Block et al.* v. *Compagnie Nationale Air France* (Nov. 8, 1967) ——F 2d——, 1967 CCH Neg Cases, p. 2307.

CONCLUSION

The decision and judgments below should be affirmed.
Dated: January 18, 1968

Respectfully submitted,

STUART M. SPEISER
Counsel for amicus curiae
Arnold Holtzman
200 Park Avenue
New York, N. Y. 10017

CHARLES F. KRAUSE
ALFRED W. GANS
DONALD W. MADOLE
SPEISER, SHUMATE, GEOGHAN & KRAUSE
Of Counsel

Certificate of Service

I hereby certify that copies of this brief *amicus curiae* have been served by first class mail on the 18th day of January, 1968, upon:

AUSTIN P. MAGNER, Esquire
GEORGE N. TOMPKINS, JR., Esquire
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

THEODORE E. WOLCOTT, Esquire
Attorney for Respondents
36 West 44th Street
New York, New York 10036

HAROLD L. WARNER, JR., Esquire
Attorney for International Air Transport Association
25 Broadway
New York, New York 10004

JOHN E. STEPHEN, Esquire
JOSEPH F. HEALY, JR., Esquire
Attorneys for Air Transport Association of America
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

ALFRED C. CLAPP
Counsel for the Republic of Italy
44 Broad Street
Newark, N. J.

EDWIN LONGCOPE, Esquire
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

ROBERT MACCRATE, Esquire
Counsel for Canada
48 Wall Street
New York, New York 10005

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

APPENDIX A

NACCA BAR ASSOCIATION
National Association of Claimants' Compensation Attorneys
OFFICE OF THE NACCA AVIATION LAW SECTION

OFFICIAL PUBLICATION:
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HOME OFFICE:
BOSTON, MASS.

Please address reply to:
STUART M. SPEISER, CHAIRMAN
NACCA AVIATION LAW SECTION
290 MADISON AVENUE
NEW YORK 17, N.Y.

September 27, 1962

Hon. Alan Boyd
Chairman, Civil Aeronautics Board
Washington 25, D. C.

Re: I.G.I.A. Report on Warsaw Convention and Hague Protocol

Dear Mr. Boyd:

We have received the report of the Interagency Group on International Aviation (IGIA) dated August 7, 1962, relating to the Warsaw Convention and the Hague Protocol. We are preparing a detailed analysis of this report which will be ready shortly. There is one phase of the report which appears to call for immediate action by the Civil Aeronautics Board, and so I am addressing this letter to you at this time. Copies are being sent to other members of IGIA, members of Congress and other interested government agencies.

One of the recommendations of IGIA is that air carriers be required to give "clear and positive notice of the limita-

tion of liability article (Article 22) of the Warsaw Convention. . . ." This is apparently the only unanimous recmomendation of all agencies concerned; for even the Department of Commerce (the only agency which gave unqualified approval to the Hague Protocol) is on record as favoring a "greatly strengthened regulation" to notify passengers of the liability limitations, and "easy access to purchase additional trip insurance".

Accordingly, it is clear that all the government agencies concerned (including the C.A.B., F.A.A. and Department of Justice) have reached the conclusion that the present language contained in air carrier tickets does *not* give adequate notice of the limitations of liability. The IGIA report concerns itself partially with a proposed future scheme which would raise the amount recoverable by international passengers from the present $8,300 to approximately $66,000; and even with this substantially higher amount, the IGIA concludes that "clear and positive notice" must be given to passengers, so that they can decide whether to buy insurance of their own. Therefore, it is patent that under the present day limitation of only $8,300, such "clear and positive notice" of the limitation is even more vitally needed by the passengers—it is *eight times* as critical today, when you reduce it to mathematics. This point was covered aptly by Senator Homer E. Capehart in his comments on the Warsaw Convention on November 10, 1961, addressed to IGIA (Attachment 61 to IGIA 23/1.3): "This is the most unconscionable provision in all our history ever to affect adversely all American citizens. There is absolutely no need for a provision of this nature, and the felony is compounded in that less than one-half of one percent of the passengers in international traffic are even aware of it."

Appendix A

Therefore, we assume that the Civil Aeronautics Board is already concerning itself with the matter of "clear and positive notice" to passengers, independant of any action on the IGIA recommendations, since this is a matter in which the traveling public needs the *immediate* protection of the C.A.B. Undoubtedly, many passengers have been killed without having had the opportunity to provide security for their families, when notice of the Warsaw limitation would have caused them to buy extra insurance for a very few dollars.

It also appears that this is a matter which the C.A.B could accomplish by administrative regulation, without the necessity for special legislation. Certainly, the Federal Aviation Act confers on the C.A.B. the power to prescribe regulations which are so basic to the protection of the public. I note that the C.A.B. has already promulgated regulations [14 C.F.R. §221.38(h)] relating to personal liability rules in air carrier tariffs.

The IGIA quite properly restricted its report to basic statements of principle; they did not spell out the form of the proposed "clear and positive notice". You of the Civil Aeronautics Board, and we of the NACCA Bar Association, must concern ourselves with this important detail —just what forms of notice must be given? Eventually, the courts will decide what is "clear and positive notice" of the Convention, through which air carriers seek to limit their liability and invoke foreign law in place of American law. In my opinion, the courts will invoke the strictest available rules of construction in deciding whether the carriers have given "clear and positive notice" to a deceased airline passenger.

The IGIA report states that the passenger "should be positively advised, when he buys his ticket or when he

checks in, of the exact amount of the carrier's limitation of liability . . . ." This is merely a general statement of the need for notice; it does not spell out the manner of assuring that such notice is given.

As a practical matter, notice of liability limits given when the passenger is checking in would *not* be adequate to accomplish the required purposes. Many passengers check in too late to buy additional trip insurance; there may be a long line at the insurance counter and just a few minutes to catch the plane. Many passengers check in at places where there is an inadequate amount of insurance available, or none at all. I believe that the amount of flight insurance available at different terminals around the country varies from about $75,000 to $225,000. Furthermore, the purchase of insurance is often a matter for careful family discussion and planning, sometimes in conjunction with an insurance broker and an attorney. The purchase of trip insurance at an airport requires the passenger to make the insurance proceeds part of his taxable estate; there is no opportunity for assignment of the policy. On the other hand, a policy of the same size purchased before the trip through the passenger's insurance broker, might be assigned in such a way that the proceeds would not be taxable as part of the passenger's estate. This can make a tremendous difference in the amount actually realized by the passenger's family upon his death. This is just one of the reasons why the purchase of substantial amounts of insurance is a matter for careful planning, which is impossible if the passenger is not alerted to the need for insurance before the time of checking in for an international flight.

Likewise, notice at the time of purchase of the ticket would not be adequate. Many passengers do not pick up

their tickets until they reach the airport. Many tickets are picked up by secretaries or other employees, and are not seen by the passenger until shortly before the flight departs. Many tickets are written or delivered by travel agents who are beyond the control of air carriers, from the standpoint of assuring notice. In fact, I believe that the majority of overseas flights originating in this country are booked by travel agents. The pattern of ticket purchase and delivery is obviously too varied and uncertain to form the basis for the giving of "clear and positive notice" of liability limitations.

Furthermore, any system of notice based upon oral advice by clerical employees would obviously be unsatisfactory. In effect, all clerical employees of all the airlines in the U.S.A. would have to decide legal questions on all tickets containing foreign destinations. They would first have to decide whether particular nations are signatories to the Warsaw Convention, the Hague Protocol and possibly other Protocols or statutes relating to the new form of insurance proposed by IGIA. They would then have to advise the passenger of the "exact amount of the carrier's limitation of liability" (to quote the IGIA report). They might then be called upon to explain the cost and details of trip insurance. Aside from the delays which this would cause at ticketing and check-in counters, it is obviously not a system which could be relied upon to give actual notice to all prospective victims of limited liability.

I stated that *all* clerical employees of *all* the airlines in the U.S.A. would be involved, because it is possible for any one of them to sell a ticket for passage covered by the Warsaw Convention. The agent of Frontier Airlines at Riverton, Wyoming may today sell a ticket from Riverton

to Denver to Mexico City and return, which passage would be covered by the Warsaw Convention. Aside from the fact that there is no flight insurance available at the Riverton airport, it would be quite a burden on Frontier Airlines to require their already-busy agent to learn the intricacies of the Warsaw Convention.

Accordingly, we believe that careful study of the problem of "clear and positive notice" will lead the C.A.B. to the conclusion that such notice would have to be given to the passenger at the earliest indication of his interest in a trip involving international carriage. This is the only way in which the passenger can be assured an adequate opportunity to consider his insurance needs and to properly provide for them. Furthermore, we believe that such notice would have to be given in printed form, rather than by oral statements of clerical employees. In order to provide each international passenger with adequate notice, we believe that a written statement of the exact amount of limitation of liability would have to appear in:

1. All advertisements and promotional material issued by airlines and travel agencies for flights involving international carriage;

2. All check-in counters, ticket offices and ticketing stations of all air carriers in the U.S.A. (including travel agencies), in the form of a large wall sign or large counter card;

3. All tickets issued by all air carriers in the U.S.A. involving international carriage, in the form of a conspicuous overprint, in larger type than the present conditions of carriage.

Appendix A

The above is probably only a minimum starting point; no doubt the C.A.B. staff will think of other important points where notice should be given. However, examination of the above three categories makes it clear that any one of them may be the last point at which the passenger would have an adequate opportunity to act on the notice by providing for his insurance needs.

No doubt many air carriers would consider such requirements onerous. However, any burden brought about by giving such notice stems directly from the offensive nature of the Warsaw Convention itself. The carriers seeking special protection of foreign law in their dealings with American citizens must be prepared to pay the price of public condemnation. Heretofore, the carriers have been able to gain this special privilege without letting the public know about it, but the IGIA report makes it clear that responsible government officials will no longer tolerate the thrusting of such an "unconscionable provision" upon the American people, to use the language of Senator Capehart.

Now that the carriers are faced with a "clear and positive notice" requirement, I believe that their attitude toward the Warsaw Convention may undergo a change. It seems apparent that the giving of "clear and positive notice" to their public would have some adverse effects on their sales programs, particularly those aimed at the 75% of the American population who have never flown. It certainly would not help their sales efforts if they are required to communicate with each passenger about the possibility of accidents, the limitations of liability and the desirability of taking out special insurance. Neither the NACCA Bar Association, nor any other responsible organization desires any unreasonable financial burdens to be

added to our air transportation industry. Instead, we believe that the time has come for the carriers to realize that they will actually save money by denouncing the Warsaw Convention and thereby relieve themselves of the necessity for giving "clear and positive notice" of liability limitation. As pointed out in the IGIA report, if the carriers are saving anything in insurance premiums through the Warsaw Convention, it is a matter of pennies (7¢ on a New York-Los-Angeles flight, and 62¢ on a New York-London flight). It appears that it will cost them much more than this to give their passengers "clear and positive notice" of the limitations, to say nothing of the added cost of the extra insurance scheme proposed by IGIA as a condition of continued adherence to Warsaw and Hague. Therefore, at the moment when the air carriers become convinced that they will have to give "clear and positive notice", on economic grounds alone (without even considering public relations) it should become apparent to them that the Warsaw Convention honeymoon is over and that the time has come to operate on the same basis as the domestic carrier—the American system of equal justice for all under the law.

Therefore, we see in this task of framing the regulations for "clear and positive notice", an opportunity for the C.A.B. to solve the entire problem of the Warsaw Convention. If you, Mr. Boyd, make it clear to the airlines *now* that you intend to enforce the IGIA decision by requiring "clear and positive notice" of Warsaw, Hague or any other limitations, I believe that you will find the airlines ready to drop their insistence on the limitations. Through a notice of proposed rule-making, or other appropriate device, it should be possible to obtain the views of the airlines on this matter.

Appendix A

If the airlines are not ready to drop the limitation, then at least the traveling public will secure the greatest possible protection under the existing limitations of the Warsaw Convention.

This matter is as urgent and imminent as the next plane to leave from Idlewild, loaded with American citizens who have never heard of the Warsaw Convention. It is much more urgent than further deliberations on the Hague Protocol and supplementary insurance legislation, for the Hague Protocol requires further action by a number of countries other than the United States before it can become effective. "Clear and positive notice" can avoid disaster and suffering *today.* Furthermore, it is most practical to approach the whole Warsaw Convention problem on the basis of what the airlines will actually do in the face of any changes, because in the final analysis, the airlines have the power under Article 22 of Warsaw and Hague to vary whatever terms might be imposed upon them. Accordingly, I respectfully request the privilege of an early appointment in Washington with you or the member of your staff in charge of this matter.

Sincerely yours,

/s/ STUART M. SPEISER
STUART M. SPEISER, Chairman
NACCA Aviation Law Section

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, ETC., *et al.*,

Respondents.

BRIEF OF BATES BLOCK AS *AMICUS CURIAE*

LEE S. KREINDLER,
Attorney for *Amicus Curiae*,
Bates Block,
99 Park Avenue,
New York, N. Y. 10016.

Of Counsel:

KREINDLER & KREINDLER,
LEE S. KREINDLER,
GERALD A. ROBBIE.

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ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

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v.

JOHN LISI, ETC., *et al.*,

Respondents.

BRIEF OF BATES BLOCK AS *AMICUS CURIAE*

Bates Block, as Executor of the Estate of Charles Baxter Jones, Jr., and as Guardian and Next Friend of three minor children of Charles Baxter Jones, Jr., and Julia Lowry Block Jones, deceased, respectfully submits this brief *amicus curiae* in support of the respondents, John Lisi, *et al.*, pursuant to leave granted him under Rule 42 of this Court's Revised Rules on January 29, 1968.

Interest of the *Amicus*

The interest of the *amicus* in this case was fully set forth in his motion for leave to file a brief, and may be briefly summarized as follows: he now has pending an action for the wrongful deaths of his two decedents in the United States District Court for the Northern District of Georgia, resulting from the crash of an Air France jet at Orly Field, Paris, on June 3, 1962. This is one of forty-five consolidated cases involving the deaths of sixty-

two decedents in that accident. The District Court and the Court of Appeals for the Fifth Circuit have held that the Warsaw Convention is applicable to the charter flight on which Mr. Block's decedents perished, and this question is now on petition for *certiorari* to this Court. Tickets of the same form were delivered to Mr. Block's decedents and therefore one of the issues involved in that case is the same as that presented for decision in the instant case, *viz.*, did said ticket provide adequate notice to the passenger of the limitation of damages contained in Article 22 of the Warsaw Convention? Indeed, the Court of Appeals as its final conclusion in the *Block* case stressed the importance of the ticket:

> "A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention. We hold therefore that the Convention applied to the transaction of the passengers in accordance with the charter flight agreement between Air France and the Atlanta Art Association." *Block* v. *Compagnie Nationale Air France,* ——, F. 2d ——, Slip. Op. p. 69 (5th Cir., Nov. 8, 1967).

Summary of Argument

The Warsaw Convention by its language and history requires that before a carrier can claim the advantage of the limitation on damages contained in Article 22, it must first provide an adequate and reasonable notice of said limitation to the passenger in a ticket which must be delivered to him.

Where the notice contained in the ticket is so miniscule as to be unnoticeable, adequate and reasonable notice has not been given to the passenger.

Assuming *arguendo* that the notice contained in the ticket was legible, its language was equivocal and uninformative and therefore it did not constitute the adequate and reasonable notice required by the Convention.

POINT I

The legislative history of the Warsaw Convention demonstrates that an adequate and reasonable notice of the damage limitation contained in Article 22 must be given in the passenger ticket before the carrier can take advantage of said limitation.

The legislative history of the Warsaw Convention is found in the minutes of the II Conférence Internationale de Droit Privé Aérien, [ICAO Doc.: 7838] held at Warsaw from October 4 to October 12, 1929 (hereinafter referred to as Conference minutes). An analysis of these minutes shows that the drafters of the Convention intended that a reasonable and adequate notice of the damage limitation of Article 22 be contained in the passenger ticket before the carrier could claim the benefit of such limitation.

Alitalia's position, that all that a carrier need do is deliver a ticket, without *any* notice provision whatsoever, is without foundation. Alitalia's selective extracting of the Conference minutes, which it claims leads to the conclusion that the "plain meaning" of Article 3 shows that no notice of the damage limitation is required, is misleading.

Translated into English the preliminary draft of Article 3 read as follows (pp. 167-168 of the Conference minutes):

"Article 3

For the transportation of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars:

a. the place and date of issue;

b. the place of departure and of destination;

c. summary indication of the route to be followed (via) as well as provided stopping places;

d. the name and address of the carrier or carriers.

The passenger ticket shall contain, besides, a clause stipulating that the transportation is subject to the terms of liability established by this Convention.

The absence, irregularity or loss of this document of transportation shall not affect the existence or the validity of the contract of transportation.

If, for an international transportation, the carrier accepts the passenger without having established a passenger ticket, or if the ticket does not contain the above mentioned particulars, the contract of transportation shall nevertheless be subject to the rules of this Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude all or part of his liability, direct or derived from the faults of his agents."

Thus, the preliminary draft version of Article 3 contained only *four* "particulars." The requirement regarding the notice of limitation of liability was not listed as a "particular", but as a separate substantive requirement.

The first pertinent discussion of the preliminary draft version of Article 3 appears on pages 100-101 of the Conference minutes. Our translation of the French is as follows:

"*Mr. DeVos,* Rapporteur . . . Thus, I would suggest adding, after letter d) of Article 3:

'e) the name, the address and the nationality of the passengers.'

These proposals have been rejected, which does not mean that they will not or would not appear on the

passengers' document of transportation: in fact, these particulars are there. But in the face of an observation by the Greek Delegate, which reads as follows: The last paragraph of the article decrees the sanctions in case of absence of the passenger ticket, or when the passenger ticket does not carry all the particulars indicated, from then on the sanction is too harsh, when there is a simple omission, a negligence of an employee of the company of transport—the commission has agreed with this viewpoint, and in the last paragraph, it eliminated the words: 'or if the document does not contain the above particulars.'

But the consequence of this was that one had to be much stricter for those particulars imposed on the passenger ticket, and we have only retained the minimum needed to consider the transport as our international transport, for the purposes of the Convention. . . . ."

Two points are significant. First, the rapporteur was referring to Article 3 in its preliminary draft form, not in its final text as adopted by the Conference. Secondly, DeVos was paraphrasing and condensing the actual proposal of the Greek delegate.

One must distinguish the preliminary draft of Article 3 from its final version*, which included *five* particulars,

---

* Article 3, as finally adopted by the Conference, read as follows:

"(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of

(Footnote continued on following page)

the last of which requires notice. The rapporteur was referring to the four particulars designated a, b, c and d, in the preliminary draft of Article 3, and *not* to the notice requirement which was important enough to warrant a separate and independent paragraph.

All doubt on this issue is resolved by reference to the actual language employed by the Greek delegate in his proposal. Conference minutes, 196-197 (our translation):

> "In conformity with Article 22 of the draft, in case of an accident, the carrier can set aside his liability if he proves that he and his agents have taken reasonable measures to avoid the damage, or that it was impossible for them to take any.
>
> However, according to Article 3, the carrier loses this advantage if the passenger ticket does not contain the particulars indicated in this article.
>
> It may happen, in fact that due to a simple neglect the carrier has omitted to mention in the passenger ticket *the place of issue,* or *the point of departure,* or *his name and address;* or even that he keeps on the ticket his old address, or finally, that he does not point out *an intermediate stopping place.*" (Emphasis supplied.)

(Footnote continued from preceding page)

necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Thus the Greek delegate was concerned about purely clerical errors on the part of airline personnel. The examples he cites involve the four enumerated particulars contained in the preliminary draft of Article 3. It is crucial that he made no mention of the separate clause relating to notice of the limitation of liability. The reason of course was that is was not one of the "particulars indicated in this Article."

The Greek delegate went on to explain that the four particulars were unimportant to the passenger, and therefore omission of them should not deprive the carrier of the damage limitation. He stated:

> "These are, in general, omissions of no great importance for the party, because it is known, or easy to establish where the ticket was issued and that departure took place at the aerodrome of such town, that the plane belongs to such company, or that the stopping place may be of no interest to the contracting party.
>
> One may ask why such an omission, of no importance in most cases, should entail, in all cases, such a serious sanction as that provided by Article 3, paragraph 4. *If the omission is of no interest to the other party and causes no damage, how can this severe sanction of the carrier be justified?*" (Emphasis supplied) *Ibid.*

The language of the Greek proposal makes sense only when limited to the four particulars, the omission of any of which is "of no great importance." See, e.g., *Grey* v. *American Airlines, Inc.*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956), in which the agreed stopping place—one of the four particulars specified in the preliminary draft of Article 3—was omitted from the ticket. The court held such an omission was "wholly unsubstantial." 227 F. 2d at 284.

However, where the omission would be of importance to the passenger in that it would cause him damage, the situation is completely different, and the Greek delegate understood this:

> "This sanction is only justified in case the omission of a particular would have caused a damage to the passenger, as it may happen under certain circumstances." Conference minutes, 197.

The delegate was of course still referring to the particulars in the preliminary draft of the Article, but if omission of one of its four particulars could "under certain circumstances" cause damage to a passenger, what could be said of omission of the notice provision? It is noteworthy that in the original draft *either* the failure to deliver a ticket *or* the failure of the ticket to have the particulars would cause the airline to lose the benefit of the limitation of damages. Notice of the limitation on liability is of vital interest to the passenger, and its omission would cause him extreme damage.

The court below properly determined that notice of the Convention's limitation was important and that its omission caused damage to the passenger, i.e., it deprived him of the opportunity to take self-protective measures with respect to the damage limitation. One such measure was specifically envisioned by Article 22 of the Convention which states, "Neverthless, by special contract, the carrier and the passenger may agree to a higher limit of liability." If the passenger does not know that the carrier's liability is limited in the first place, i.e., if an adequate and reasonable notice is absent from the ticket, then Article 22 is rendered meaningless. *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U. S. 816 (1965).

Petitioner erroneously contends that Article 3 as finally adopted does not require delivery of a ticket with a notice

as to the limitation of liability, and that the "plain meaning" of the Article—all that need be resorted to by a court—mandates such a conclusion. Such an approach, however, contravenes proper principles of treaty interpretation and sound reason. The language of the treaty should never become a "verbal prison". *Sullivan* v. *Behimer*, 363 U. S. 335, 358 (1960) (Frankfurter, J., dissenting). Analysis of it "* * *" may lead the court to conclude that the language of the provision only imperfectly manifests its purpose, * * *" (*Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804, 812 [2d Cir. 1966]), and therefore:

> "It would be inconsistent with the 'wise counsel to reject "the tyranny of literalness,"' [citation] if the court in the latter situations did not seek to interpret the provision so as to effectuate its purpose, even if this requires departing in some measure from the letter and reading the language in a practical rather than literal fashion." *Ibid.*

The only way in which Article 3 can be construed so as effectuate the purposes of the Convention is to require that the passenger be afforded notice in the passenger ticket of the limitation of liability.

POINT II

The notice of the Convention's limitation contained in the ticket at bar is so small as to be unnoticeable. Failing to provide an adequate and reasonable notice, the carrier may not take advantage of the damage limitation contained in Article 22.

It is apparent from an inspection of the ticket at bar (reproduced in the district court's opinion, 253 F. Supp. at 240-242) that the notice provision is so miniscule as to be, from a practical standpoint, unnoticeable!

After remarking that the notice in a standard airline ticket was "in such exceedingly small and fine print as almost to defy reading", New York's highest state court recently stated:

> "Thus, although there was literal compliance with the prescription of Article 3, the question arises whether such compliance satisfies the Convention's demands when viewed in the light of its overall purposes. We do not believe that it does. *In our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention.*" (Emphasis added) *Egan* v. *Kollsman Instrument Corp.*, —— N. Y. 2d ——, December 28, 1967, Slip Op. pp. 6-7.

A comparison between the physical appearance of the Alitalia ticket and that of the model ticket annexed to the Conference minutes (p. 174) (a life-sized reproduction of the model ticket appears as Appendix A on p. A1 of this brief *amicus*) shows that the model contains a notice in prominent size type equal to that employed on the rest of the ticket. It states (as translated from the French):

> "This passenger ticket is subject to the terms of liability established by the International Convention of _____".

As shown in Point I, *supra*, the drafters of the Convention felt that basic fairness required the passenger to be given reasonable notice of the fact that his right to collect damages was being severely curtailed. This led to the requirement that a ticket containing a notice be delivered to the passenger before the carrier could claim the limitation of Article 22. If the notice provision is so small as to be virtually unreadable, and further if it is buried in

a "thicket of 'Conditions of Contract'," then there has not been the reasonable notice contemplated by the drafters and the carrier is not entitled to the damage limitation.

POINT III

Even if the notice contained in the ticket at bar is held to be readable, its language is so uninformative that it does not constitute the reasonable notice envisioned by the drafters and required by Article 3.

The model ticket (Conference minutes, 174) with its clear and definite statement that it *is* subject to the Convention, is in stark contrast to the Alitalia notice with its confusing and rambling language. One of the coupons in the ticket at bar (reproduced at 253 F. Supp. 242) states that the Warsaw Convention *may* be applicable; the Conditions of Contract state that it is applicable "unless such carriage is not 'international carriage' as defined by the Convention. (See carrier's tariffs, conditions of carriage for such definition.)" As the Second Circuit pointed out in its opinion below,

> "* * * even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon." 370 F. 2d at 514, n. 10.

Commentators have reached the same conclusion:

> "Even if the passenger could read the ticket, he would hunt in vain for warning of the liability limit." Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 512 (1967).

How can the passenger determine from the qualified notice provision in the ticket at bar whether his passage is or is not governed by the Convention unless he has inti-

mate knowledge of Article 1 of the Convention which defines "international transportation" or unless he is with an international aviation attorney?

The test as always is one of reasonableness.* The statement in the ticket at bar, couched as it is in terms of possibilities, with exceptions and references to tariffs, etc., is uninformative, unreasonable and therefore does not comply with the requirements of Article 3.

Conclusion

The notice provision contained in the Alitalia ticket is (a) unreadable because of its miniature type size, and (b) uninformative because of its language. The notice is therefore inadequate and unreasonable and does not meet the requirements of Article 3. The carrier is not entitled to the limitation of damages contained in Article 22, and the opinion below should be affirmed.

Respectfully submitted,

LEE S. KREINDLER,
Attorney for *Amicus Curiae*,
Bates Block,
99 Park Avenue,
New York, New York 10016.

Of Counsel:

KREINDLER & KREINDLER,
LEE S. KREINDLER,
GERALD A. ROBBIE.

---

* *Reasonable* notice does not necessarily mean *actual* notice and therefore Judge Moore's concern in his dissent below is unwarranted. It is not claimed that the carrier must provide actual notice, e.g., insist that the passenger read the ticket, provide him with an attorney, etc. However, a reasonable man should be able to at least see the notice provision without the aid of a magnifying glass, and understand it without having to consult an attorney.

Certificate

This is to certify that on the 5th day of February, 1968, copies of the above brief as *amicus curiae* were mailed, with first class postage attached, to Austin P. Magner, Esq. of the firm of Condon & Forsyth, One Rockefeller Plaza, New York, New York 10020, attorney for petitioner Alitalia-Linee Aeree Italiane, S.p.A., and Theodore E. Wolcott, Esq., 36 West 44th Street, New York, New York 10036, attorney for respondent John Lisi, *et al.*

LEE S. KREINDLER

ANNEXE

(Documents de transport visés à l'article 19 de l'Avant Projet de Convention)

MODÈLE I

BULLETIN INTERNATIONAL DE PASSAGE

RECTO

N°	N°	N°
Transporteur	*Transporteur*	*Transporteur*
Adresse	*Adresse*	*Adresse*
Points de départ:	Points de départ:	Points de départ:
et de destination:	et de destination:	et de destination:
via	*via*	*via*
Arrêts prévus	Arrêts prévus	Arrêts prévus
Date	Date	CONDITIONS DE TRANSPORT AU DOS
Service	Service	Billet délivré à ... le ...
Prix	Prix	pour le voyage
		Prix

VERSO

Le présent bulletin de passage est soumis au régime de la responsabilité établi par la Convention internationale du _____

DISPOSITIONS PRINCIPALES

PREME COURT, U. S.

FEB 7 1968
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,
Petitioner,

vs.

JOHN LISI, Etc., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AIRLINE PASSENGERS ASSOCIATION AS AMICUS CURIAE

WILLIAM A. JENNINGS,
FLOYD A. DEMANES,
1860 El Camino Real - Penthouse,
Burlingame, California 94010,
Counsel for Airline Passengers Association, Amicus Curiae.

A. LEE SANDERS,
DEMANES & JENNINGS,
1860 El Camino Real - Penthouse,
Burlingame, California 94010,
Of Counsel.

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BRIEF OF AIRLINE PASSENGERS ASSOCIATION AS AMICUS CURIAE

NATURE OF THE INTEREST OF THE AIRLINE PASSENGERS ASSOCIATION

The Airline Passengers Association (APA) is an unincorporated organization of over 11,300 members. It came into being in 1959 to serve the welfare of persons who regularly fly on domestic and international air carriers. A large number of its membership often fly in "international air transportation" within the

meaning of the Warsaw Convention. As a result, the APA is vitally concerned with the social and economic effects that the Convention has had and will continue to have upon its members and the public.

ARGUMENT

A. INTRODUCTION.

At the outset the Airline Passengers Association (APA) wishes to emphasize that the issues raised by this case must be considered in the context of present day economic realities. Americans provide the bulk of international air transportation revenue. Further, they enjoy one of the highest standards of living in the world.

B. THE APPLICATION OF THE WARSAW CONVENTION LIMITATION RESULTS IN THE DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Treaty provisions cannot abrogate rights protected by the Amendments to the Constitution of the United States. *Reid v. Covert* (1957) 354 U.S. 1. Hence, any Treaty provision agreed to by the Executive and duly ratified by the Senate must conform to the Constitutional restrictions upon the powers of the United States government created by the Fifth Amendment. Neither the Executive nor the Senate can deprive citizens of their property without due process of law.

"Property" as used in the Fifth Amendment should not be narrowly construed so as to be limited to

tangible quantities. See *Sardino v. Federal Reserve Bank of New York* (2d Cir. 1966) 361 F.2d 106. The ability of the individual to convert his labor into things of universal value is measurable in definite terms. It is well known that actuarial science has reached a point where one's future earning capacity can be established with a high degree of accuracy. Government, financial institutions and insurance companies rely heavily upon the reasonableness of these calculations.

When this earning capacity is destroyed or diminished, because of death or disability, the injured parties are deprived of valuable property of a measurable magnitude. This is illustrated in Appendix A. Throughout this country and most of the world the rule is universal that where this earning capacity is wrongfully destroyed or diminished the injured parties are entitled to compensation.

The APA respectfully suggests to the Court that when an arbitrary maximum limit is placed on such compensation the injured parties are deprived of "property" without due process of law. The difference between the limit and the actual loss has been taken from them without even the slightest exercise of jurisprudence.[1] Where that limit is as low as that found in the Warsaw Convention ($8,300.00) the gravity of the deprivation is manifest.[2]

---

[1]See Appendix B.

[2]Even those few states of the United States that have retained maximum limitations on damages for wrongful death have rejected such a low value. See Appendix C.

This low limit became applicable to the claims of these plaintiffs by reason of conduct of the Executive and the Senate. The APA contends that these activities were in violation of the due process restrictions of the Fifth Amendment of the Constitution of the United States. Hence, the $8,300.00 limitation of the Warsaw Convention as applied to these plaintiffs has deprived them of property without due process of law.[3]

C. THE CARRIER IS IN A BETTER POSITION TO BEAR THE BURDEN OF NOTIFICATION OF THE APPLICABILITY OF THE WARSAW CONVENTION.

The APA suggests that the underlying policy consideration is that the carrier must bear the burden of notification of the applicability of the Warsaw Convention. *Warren v. Flying Tiger Line* (9th Cir. 1965) 352 F.2d 494; *Mertens v. Flying Tiger Line* (2d Cir. 1965) 341 F.2d 851, cert. denied (1965), 382 U.S. 816. Should the provisions of Article 3 (1) and (2) be construed to require the carrier to adequately notify the passenger? Or, should the passenger be obligated to search, with a magnifying glass, through the labyrinth of fine and often unreadable print found on passenger tickets? Then, should the passenger bear the burden of construing such language to determine whether the flight is in "international air transportation"?

---

[3]It should be noted that such a ruling would not defeat the uniformity in international law created by the Convention. Presently there are three limits being applied: (1) the Warsaw limit ($8,300), (2) the Hague Protocol limit ($16,600), and (3) the limit of the Interim Agreement ($75,000).

The APA contends that the carrier is in a far better position to communicate to the passenger the fact that the transportation contracted for is subject to the provisions of the Convention. They have greater resources and facilities. The average passenger is little concerned with the legal technicalities involved. He or she is much less able to make the complex determination of whether the transportation contracted for is "international" within the meaning of the Warsaw Convention.

The law is clear in its command that a common carrier owes the highest degree of care to its passengers. The carrier has a positive obligation to do everything necessary to render its passengers safe from harm and distress. Such an obligation is poorly met when an air carrier so constructs its passenger ticket that those provisions which would notify the passenger of the limit of the carrier's liability are effectively concealed.

The Civil Aeronautics Board has imposed this burden of notification upon the carrier subsequent to the accident involved herein. The Federal Aviation Regulation (FAR) Section 221.175 requires the carrier to furnish each passenger with a written statement to the effect that the Convention may apply and that it may limit the carrier's liability. Further it provides that such a statement must be printed in "type at least as large as ten point modern type." Admittedly this regulation was not effective at the time of this accident. Be that as it may, FAR 221.175 clearly indicates the policy of the Executive Branch; to wit,

that air carriers in international transportation have a greater obligation to the passenger than to print such statements in print so small as to be "virtually invisible" and "unreadable."

CONCLUSION

The $8,300.00 Warsaw Convention limitation was established at a time when international aviation was an infant industry. The infant has grown into a giant. It is able, but unwilling, to assume its adult responsibilities. No longer does the practical justification for the limitation exist. Hence, if the limit has no justification in fact, it should have no application in law.

Dated, Burlingame, California,
February 5, 1968.

Respectfully submitted,
WILLIAM A. JENNINGS,
FLOYD A. DEMANES,
Counsel for Airline Passengers Association, Amicus Curiae.

A. LEE SANDERS,
DEMANES & JENNINGS,
Of Counsel.

(Appendices A, B and C Follow)

Appendix A

Assume that the decedent was a 30-year old white male earning $10,000 per year. Based on the "Vital Statistics of the United States, 1964, Vol. II, Sec. 5" Department of Health, Education and Welfare, he had a life expectancy of 41.0 years.

Further assume that his work life would end at 65. He would have had a work life expectancy of 35 years.

The value of his future earning capacity, discounted to present value, using a rate of 4%, would be $186,646.00.

Since the Warsaw Convention limitation is $8,300.00, his widow and children would be deprived of $178,346.00 of reasonably expectable future earnings usable for their maintenance and care.

Appendix B

The Tables below are based on the results obtained by the Civil Aeronautics Board when it sent a questionnaire to each United States carrier in 1965. They were asked to list all accidents since January 1, 1958. Further, they were requested to provide the amounts of all settlements and verdicts for death and serious personal injury. See Lowenfeld and Mendelsohn, "The United States and the Warsaw Convention," 80 Harv. L.Rev. 497, 553-555.

TABLE I

Passenger Recoveries (Including Both Judgments and Settlements) in Warsaw and Non-Warsaw Fatality Cases (United States Carriers[a])

Applicable Year	Number of Settlements[b]	Total Settlements	Average per Passenger Fatality
		Warsaw	
1950	25	$ 201,529	$ 8,061
1951	26	82,015	3,154
1952	43	276,634	6,433
1953	3	28,088	8,696
1954[c]	—	—	—
1955	1	10,576	10,576
1956	2	11,656	5,828
1957	23	108,700	4,726
1958	1	4,812	4,812
1959	53	405,710	7,654
1960	10	74,700	7,470
1961	8	37,227	4,653
1962	2	12,000	6,000
1963	2	16,600	8,300
1964	14	114,000	8,142
Totals	**213**	**$ 1,382,247**	**$ 6,489**
		Non-Warsaw	
1950	112	$ 1,327,385	$11,852
1951	105	1,506,764	14,350
1952	107	2,493,165	23,301
1953	62	2,362,910	38,111
1954[c]	—	—	—
1955	122	2,433,345	19,945
1956	85	2,467,980	29,035
1957	43	1,295,064	30,118
1958	112	6,451,351	57,601
1959	161	12,856,984	79,857
1960	184	8,901,610	48,378
1961	105	1,562,397	14,880
1962	117	7,421,849	63,434
1963	114	3,057,079	26,816
1964	23	1,763,000	76,652
Totals	**1,452**	**$55,900,883**	**$38,499**

[a] Includes 13 U.S. carriers operating scheduled international and/or domestic trunkline services.

[b] Does not include actions as yet unsettled by final judgment or compromise.

[c] No judgments or settlements were reported for accidents occurring in 1954.

TABLE II

Levels of Passenger Recovery In Non-Warsaw Fatality Cases, 1958-1964 (United States Carriers)

Amount of Payment	Number of Claims	Percent of Claims
0	53	6.5
$1–$8,292	194	23.9
8,293–16,583	159	19.5
16,584–33,000	115	14.1
33,001–50,000	54	6.6
50,001–75,000	47	5.8
75,001–100,000	45	5.6
100,001–200,000	110	13.5
200,001 and up	36	4.4
Totals	**813**	**100.0**

Appendix C

The number of jurisdictions in the United States with limitations on damages for wrongful death has steadily decreased since 1935, as will be seen below:

1935.....16 states and the District of Columbia
1955.....15 states
1965.....13 states
1967.....10 states

Since 1935 the maximum amounts of the remaining limitations have steadily increased, as will appear below:

Jurisdictions	Amounts ($)			
	1935	1955	1965	1967
1. Alaska	10,000	50,000	No limit (N/L)	N/L
2. Colorado	5,000	10,000	25,000	35,000
3. Connecticut	10,000	N/L	N/L	N/L
4. District of Columbia	10,000	N/L	N/L	N/L
5. Illinois	10,000	25,000	30,000	N/L
6. Indiana	10,000	15,000	N/L	N/L
7. Kansas	10,000	25,000	25,000	35,000
8. Maine	5,000	10,000	30,000	N/L
9. Massachusetts	10,000	20,000	50,000	50,000
10. Minnesota	7,500	17,500	35,000	35,000
11. Missouri	10,000	25,000	25,000	50,000
12. New Hampshire	10,000	15,000	40,000	60,000
13. Oregon	7,500	17,500	25,000	N/L
14. South Dakota	10,000	20,000	30,000	30,000
15. Virginia	10,000	25,000	40,000	40,000
16. West Virginia	10,000	20,000	25,000	110,000
17. Wisconsin	10,000	15,000	22,500	22,500

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October Term, 1967

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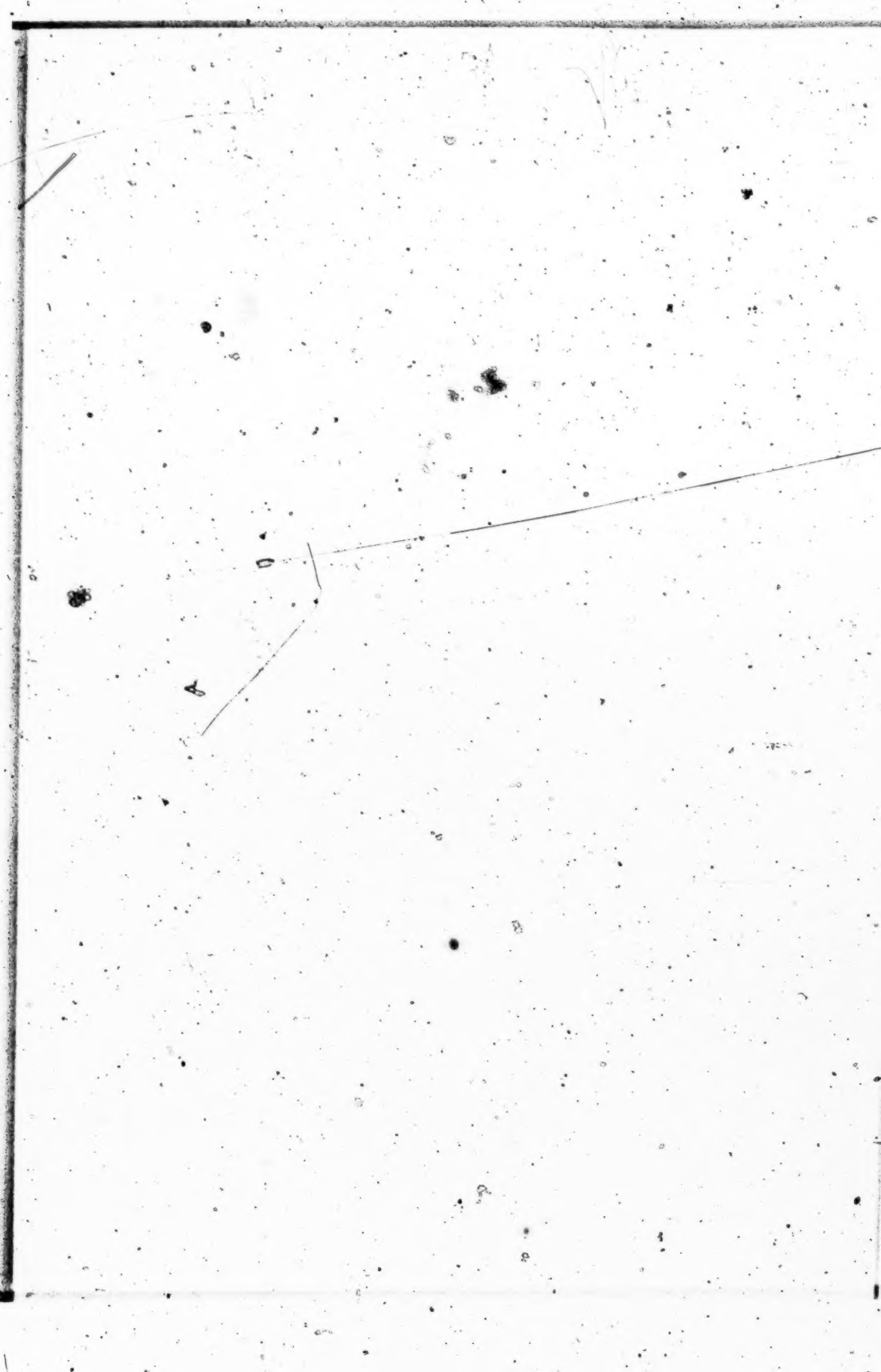
JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

THEODORE E. WOLCOTT
Counsel for Respondents
36 West 44th Street
New York, New York 10036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Pan American World Airways, Inc. et al., *Conditions of Carriage & Related Traffic Regulations*, 24 C.A.B., 575 (1957) 40
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Other Authorities:

Beaumont: *Anomalies In The Warsaw Convention*, 14 J. Air. L. & Co. 30, 34 49

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Cohen: *Negligence Law In Europe*, 361 Ins. L.J. 82, Feb. 1953 31

Gasdik, Julian S.: *The New Contract Between Air Carrier and Passengers*, 24 J. Air L. 86. 151, 153 (1957) 53
Goedhuis, *National Airlegislations and the Warsaw Convention* (1937) 38

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International Law of *Rebus Sic Stantibus* (Amer. Law. Inst. Restatement 2d. Id. Foreign Relations Law, Sec. 153) 22

Orr, George W.: *Fault As the Basis of Liabilities*, J. Air L & Co. 399, 402 31

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS*

Questions Presented

1. Whether the petitioner Alitalia delivered to its passengers before departure of the aircraft involved, a ticket contract which complied with the prerequisites of the Warsaw Convention and which gave clear and readable notice to the passenger that the transportation was subject to the provisions of the Warsaw Convention which limit its liability?

---

* Emphasis, wherever the same appears is our own unless otherwise noted.

2. Was the decision of the Court of Appeals affirming the District Court, correct in holding as a matter of law, that there was no delivery here of a ticket complying with the Warsaw Convention in that the so-called ticket was unnoticeable and unreadable and consisted of a mass of "microscopic print", the conditions "camouflaged in Lilliputian print", "the exculpatory statement on which defendant relies . . . virtually invisible . . . inffectively positioned . . . artfully camouflaged . . . (and) concealed . . ." and that the passenger, therefore had no reasonable opportunity to protect himself against the limitations of liability?

3. (Assuming but not conceding readability and that this question be reached) — Did the so-called ticket comply with the requirements of the Convention that it contain an unconditional as well as readable notice that the transportation involved is subject to limitations of liability?

4. (Assuming but not conceding readability and intelligibility, and that this further question be reached) — That as to the DiSclafani family (*Como* action) originating on Alitalia in Tunis where their tickets were issued, should the notice and conditions of carriage on the ticket have been in Arabic, the official language of Tunisia, in order to impute notice of these conditions to passengers?[1]

---

[1] The so-called "Questions Presented" by Alitalia numbered 2 and 3 are not here involved, are improper and should be disregarded. As to so-called Question No. 2: Any attempt by Alitalia on this appeal to erect an issue as to the adequacy of the baggage checks is improper. The plaintiffs did not put into issue the adequacy of the baggage check since the values of the baggage lost in these cases were below the Convention limits. There is a vast difference in the basic approach of our courts to the question of limitation of liability for wrongful death or personal injuries and in their approach to the limitations of liability for loss of bag-

Statement of the Case

These are five actions for wrongful deaths and serious personal injuries variously suffered by respondents and their decedents (collectively referred to herein as "plaintiffs") arising out of an airplane crash on February 26, 1960 on take-off from Shannon Airport, Ireland, where it had stopped for fuel, in the course of a transatlantic flight from Rome to New York on an aircraft owned and operated by petitioner (hereinafter referred to as "Alitalia"). In its answers to the complaints herein, Alitalia uniformly set up affirmative defenses that "the transportation was being performed pursuant to a contract made with each of plaintiffs decedents"; that "the rights of the parties herein are governed by said contracts of transportation," and that Alitalia has duly complied with the conditions of the Warsaw Convention (¶52, A. 4a), and has not entered into a special contract for a higher limit of liability" (¶59, A. 6a) that the liability if any, was limited to $8,291.87.

These actions involve the deaths of seven passengers and serious personal injuries of six other passengers— thirteen passengers in all. The enormous consequences of this crash may be well illustrated by a brief reference to the calamity suffered as a result of the negligence of Alitalia in one of

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gage or personal property. See *Seth* v. *British Overseas Airways Corp.*, 329 F. 2d 302 which involved a claim for baggage only. However no question was there raised as to the readability of the notice to the extent that this question may be found to be pertinent here. Respondents' position is that the baggage check nevertheless suffers from the same defects as the ticket although this is not before the court. As to so-called Question No. 3: The notice conditions printed on the passenger ticket were held by the courts below to be unreadable as a matter of law. The question was also conceded by both sides to be a matter of law. At no time in its papers, briefs or argument to the courts below did Alitalia claim that this was a jury question.

the cases herein, *Como as guardian ad litem of the DiSclafani children and as Administratrix of the DiSclafani decedents,* Civil Number 63-1734 (A. 107a). The *DiSclafani* family were on their way to New York on Alitalia from Tunis. The family consisted of a widowed mother, Caterina and her four children, Nicholas aged 17; Alfredo aged 15; Maria aged 12 and Guiseppe aged 10. The widow and Alfredo died of fatal injuries suffered in the crash. The other children suffered serious and permanent injuries requiring medical and hospital treatment in Ireland and later in the United States and some of them are still undergoing medical treatment. The crash totally disabled Nicholas. His injuries included permanent paralysis of the lower extremities. He is now a paraplegic and permanently confined to a wheelchair. Maria suffered fractures of the pelvis and other parts of the body among other injuries. Guiseppe also suffered multiple fractures among other injuries. It would be unnecessary to dwell upon the excruciating pain, shock and emotional disturbance suffered by these children.[2]

It is conceded for the purposes of the proceedings herein that the transportation was international and was otherwise subject to the relevant provisions of the Warsaw Convention. It is not conceded that the tickets and baggage checks in any way comply with the Warsaw Convention, nor that Alitalia has sustained the required pre-conditions of establishing that it complied with the convention. The rights of the *DiSclafani* claimants in the *Como* action are reserved on the question whether Tunisia was a party to the Warsaw Convention at the time the so-called tickets herein were issued in Tunisia to the *DiSclafanis.*[3]

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[2] From answers to interrogatories filed by plaintiffs in the U.S. District Court.

[3] For the purposes of the original motion before the District Court this issue was there withdrawn by the plaintiffs. See footnote 7 of Opinion by Judge MacMahon. (A83a).

Plaintiffs Motion for Partial Summary Judgment and the Decision of the District Court

Plaintiffs moved in the District Court for partial summary judgment striking the defenses on the ground that there was no delivery of a ticket to the passengers containing readable and intelligible notice of limitation of liability as required by Warsaw and under American law and that therefore the small damage limit of liability could not be applied. Alitalia claimed that the ticket need contain no notice, nor any other particulars and, in effect, could be blank. It should be noted that the adequacy of the ticket solely as such was put into issue in the District Court by the plaintiffs' moving papers (A. 13a, 15a, 17a, 26a, 29a) as further certified by plaintiffs' attorney (A. 65a, 70a) and also as certified by Alitalia's attorney (A. 66a).

District Judge MacMahon held that the tickets herein failed to notify "the passengers that the exclusion or limitation provisions of the Convention were applicable." He held that the ticket compelled this conclusion for the reason that the statements in the so-called ticket were printed in the manner as to be virtually unnoticeable and unreadable employing such descriptive terms as "Microscopic type . . . camouflaged in Lilliputian print . . . . concealed . . . in a thicket . . . which must be read through a magnifying glass."

> "The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2 (a) camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, con-

trasting color, or anything else. Lilliputian typography, which must be read through 'a magnifying glass', is at war with the intent of the Convention" citing cases (A. 82a).

". . . Manifestly, if the ticket and check delivered by the airline fail to notify the passenger that the exclusion or limitation provisions of the Convention are applicable, the passenger is not afforded a reasonable opportunity to protect himself by deciding not to take the flight, entering into a special contract with the carrier, or taking out additional insurance" (A. 75a).

Judge MacMahon in footnote 7 of his Opinion rejected plaintiffs' additional point that even if readable the references in the ticket to the applicability Warsaw when framed in conditional terms was therefore objectionable (A. 82a). A reproduction of the ticket was included in Judge MacMahon's Opinion (A. 78a).

The Decision of the Court of Appeals

The Court of Appeals below affirmed the District Court, two-to-one (A. 89a) 370 F. 2d 508. The majority fully agreed with the District Court that Alitalia as a matter of law had failed to deliver to the passenger a readable and intelligible ticket complying with the Warsaw Convention.

The court incidentally noted that the Convention's arbitrary limitations on liability, "which have been severely and repeatedly criticized" are advantageous to the carrier but that "the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit" (A. 96a). The Court noted in this connection that "Article 3 must be viewed in light of the other articles and the overall purposes of the convention"; and that its decision was generally consistent with the policy of the United States Government and the Civil Aeronautics Board.

The court below agreed that the District Judge "appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print . . . . in a thicket'" and that the so-called 'exculpatory statements' . . . are 'virtually invisible'. The court also observed in a footnote number 10 of its Opinion that even if a passenger were able to read the fine print "it is highly questionable whether he would be able to understand the meaning of the language" (A. 98a).

THE DISSENTING OPINION: In his dissenting Opinion, Judge Moore perforce assumed a series of extreme

postures. While agreeing that the ticket provisions were "in exceedingly small type", Judge Moore expressed the extreme view that adequacy of notice on the ticket was immaterial; that even if a "one-sided advantage is being taken of the passenger" he was not protected by Warsaw, and, in any event, he apparently should not be protected by our courts. Judge Moore attempted to reinforce his argument by erecting a straw man of an "actual notice" ruling by the majority which, in fact, had not been urged by the plaintiffs nor held by either of the courts below. It should be observed that, except for a slight increase made by the Hague Protocol (not accepted by the United States) no "substantial revisions upward . . . have been made by treaty", as claimed by Judge Moore. There have been no revisions. However, there were some subsequent tariff changes relating only to transportation touching upon U. S. territory, made by means of the air carriers filing conditional and cancellable tariffs. These tariffs were apparently filed to induce the United States to withdraw its denunciation of Warsaw (see footnote 7, majority opinion below, A. 96a).

Nor did either of the courts below attempt to revise the limits as suggested by Judge Moore. They were concerned only with and ruled only upon the adequacy of notice to the passenger of the limitations of liability as expressed on the ticket. In no way did they rewrite the convention but they merely construed sections pertinent to the point at issue.

Judge Moore took the extreme and unsupported position that the convention so clearly stated that no notice need be contained in the ticket (and that any kind of ticket could be delivered to the passenger), that there was no room for construction; that construction meant interference and "judicial treaty-making." Judge Moore chose to

ignore the well established rule that a treaty, like any other federal statute, is subject to judicial construction and interpretation.

Both the District Court and the Court of Appeals interpreted Warsaw within its framework and cited and applied established principles of law. They properly held that the so-called ticket did not comply with the requirements of the Warsaw Convention and in so doing they did not rewrite, modify or repudiate the Convention.

Summary of Argument

The Court of Appeals has followed the well established principles of construction of treaties and has given the Warsaw Convention a reasonable construction within its overall purpose, context and history that is incidentally fair to both the passenger and the air carrier. The decision is consistent with the overall pattern and intent of Warsaw that a contract must be made between passenger and carrier which contains required particulars essential to its understanding; that the air carrier must deliver to the passenger such a ticket-contract containing clear and readable notice of the exculpatory provisions before it can claim the convention's one-sided benefits. The decision is a reflection of well established public policy and is in accord with the policy of the United States Government and of the Civil Aeronautics Board's own position requiring clear and adequate notice. (See Memorandum for the United States as *amicus curiae*.)

The decision of the Court below is in accord with all Court decisions construing Article 3 of the Convention, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (C.A. 2); *Warren* v. *Flying Tiger Line, Inc.* (1965 C.A. 9), 352 Fed. 2d 494, and with the most recent decision squarely on the

point by the New York Court of Appeals, *Egan* v. *Kollsman Instrument Corp. & American Airlines*, January, 1968, —— N. Y. 2d ——, and with the reasoning in the *Eck* v. *United Arab Airlines* Cases 360 F. 804 and 15 N. Y. 2d 53. It also follows the basic principles of American law requiring reasonable notice to a passenger where limits of liability are sought to be imposed, notwithstanding the negligence of the carrier. The structure and purpose of the Warsaw Convention is in accord with the foregoing and is in direct contradiction to the position of Alitalia that there need be no contract, that only a blank boarding pass need be handed to the passenger and that the limitations of liability of the Warsaw Convention will be automatically imposed because this is otherwise Warsaw transportation. Alitalia has been unable to cite a single case in direct support of its position.

The structure of the Convention is skeletal and does not attempt to cover all details. It was designed in such a manner as to allow for the operation of local national law on the issues here involved. As was observed of the decision below in the United States Government's *Amicus* brief: "It also represents, in our view a proper performance of the judicial duty of the courts of contracting states to implement the broad provisions of the Convention" (p. 7).

The position of Alitalia has been reduced to a *reductio ad absurdem*. While admitting that "use . . . and delivery of a passenger ticket is a 'must and compulsory'," (Alitalia brief, pp. 9 and 10) it nevertheless argues that none of the particulars prescribed in Article 3 of Warsaw need be on the ticket. In effect, Alitalia urges all that is required to shield the carrier from the consequences of its negligence is to hand the passenger a blank, "Boarding Pass". Obviously delivery of such a "ticket" would be a meaningless

exercise in futility. Similarly Alitalia has without foundation claimed that the circuit court's holding would result in the application of "sanctions" of absolute liability. While not conceding that this would be a dire consequence, plaintiffs contend that this issue is not in this appeal, having neither been raised nor passed upon below and that a finding of absolute liability would not necessarily follow. In any event Alitalia, having for many years at the passenger's expense reaped the benefits of its defective ticket, is in no position to complain. Plaintiffs anticipate no difficulty in proving ordinary negligence on the part of Alitalia in causing the crash, if that should prove necessary.

In an attempt to overcome the plain intent of Article 3 and the context of the convention, Alitalia has resorted to carefully selected excerpts from the Minutes of the Warsaw Conference of 1929. As the Conference Minutes confirm, the Convention is a one-sided arrangement, entirely favoring the commercial carrier at the expense of the passenger and in diminution of his basic legal rights to recover fair compensation for injuries suffered through fault. Although the carrier's liability remained based on fault, in an illusory exchange for a rebuttable presumption of limited liability [Article 20(1)], the carrier was given a low ceiling of up to $8300 of provable damages for death or injury to a passenger notwithstanding the carrier's negligence. However the grant of this unconscionable advantage to the carrier and the virtual extinction of the passengers' rights was conditional upon the delivery to the passenger of a ticket giving him clear notice of the limitation of the carrier's liability.

The misplaced emphasis by Alitalia on certain language differences in the Articles relating to the ticket and to the baggage checks and airway bills are not in keeping with the overall text of the Convention, its purpose nor

with its history. In fact the Minutes establish that there was a common element of notice to the passenger as well as to the shipper; that the form of the passenger ticket was made more flexible because of the possibilities of clerical error in omitting a particular which might prove immaterial. Whereas in case of the baggage check and airway bill, certain particulars were mandatory because they cover unaccompanied goods and the information was necessary to ascertain ownership and to compute damage in case of loss.

Notwithstanding the main issue of the delivery of an adequate ticket it is, nevertheless, also contended by plaintiffs that a statement that the transportation is subject to the rules relating to limitation of liability under the Warsaw Convention must be clearly unconditional as required by the Convention.

It is further contended [assuming this point to be reached] as to the DiSclafani family, which embarked from Tunis where the ticket was issued, that in order to charge them with imputed knowledge, the conditions of carriage would have to be in the official language of the country [Tunisia] where the ticket was issued, which is Arabic in this instance.

The *Amici* briefs filed herein on behalf of Alitalia's position must be regarded as designed to advance special commercial interests and not that of the public. They are filed by trade associations of commercial air carriers, the Air Transport Association of America (ATA) and the International Air Transport Association (IATA) and by countries which directly or indirectly own and control commercial air carriers, viz: Italy—which owns Alitalia, United Kingdom—which owns British Overseas Airways Corporation and British European Airways; Canada—which owns Air Canada, formerly Trans-Canada.

I.

Alitalia Failed to Deliver to the Plaintiffs' Decedents a Ticket Containing Readable and Clear Notice of the Limitation of Liability as Required in the Convention, and Its Exculpatory Provisions Therefore Cannot be Invoked by Alitalia to Escape the Consequences of Its Negligence in Causing the Crash.

A. *Warsaw Requires Prior Delivery of a Ticket Containing Clear and Adequate Notice.*

The weight of authority is that prior readable and clear notice in the ticket of limitations of liability is required by the Warsaw Convention. This is also in keeping with well established principle. The decision of the Court below is in accord with all of the reported decisions on this point. *Egan* v. *Kollsman Instrument Corp., and American Air Lines,* —— N. Y. 2d —— (decided January, 1968); *Mertens* v. *Flying Tiger Line, Inc.,* 341 F. 2d 851 (C.A. 2), cert. den. 382 U. S. 816; *Warren* v. *Flying Tiger Line, Inc.,* 352 Fed. 2d 494 (1965 C.A. 9); the *Eck* v. *United Arab Airlines, Inc. Cases* reported in 360 F. 2d 804 (C.A. 2); and 15 N. Y. 2d 53. In so construing the intent of Article 3 and the purpose of the convention, the court below also observed the basic principles of law requiring readable notice thereof in a ticket where limited liability is sought to be imposed notwithstanding the negligence of the carrier. In the course of its analysis of the convention, the court stated:

> "Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra*" (A. 94a).

The court then quoted from its prior decision in *Eck* in which similar issues were present and in which it had held that the ticket and notice were inadequate:

> "'We read Article 3 (2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. Such self-protective measures, could consist of for example, deciding not to take the flight, entering in a special contract with the carrier, or taking out additional insurance for the flight. *The Convention specifically provides that 'the carrier and the passenger may agree to a higher limit of liability' (Article 22 (1)) and there would be little reason* to make this provision, to require that the ticket state that the liability of the carrier is limited. (Article 3 (1) (e)), and to require that such a ticket be delivered to the passenger *unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.' Id.* at 856-57 [Emphasis added.]" (A. 94a).

The court below concluded that the notice on the *Lisi* ticket was illegible and unreadable:

> "Judge MacMahon appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'. . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are in effectively positioned, diminutively sized, and unemphasized by bold-face type, contrasting color, or anything else. The simple truth is that their presence is concealed'" (A. 98a).

The Court then affirmed:

> "We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant. Affirmed (A. 100a).

The latest decision on the precise point at issue here is the recent unanimous holding of the New York Court of Appeals that a similar international ticket was insufficient and unreadable and that the air carrier therefore could not invoke the limitations of the Warsaw Convention. See *Egan* v. *Kollsman Instrument Corp. & American Airlines,* —— N. Y. 2d ——, January, 1968, in which *Lisi* was explicitly followed.* We quote from the opinion of Chief Judge Fuld for a unanimous court:

> "Mrs. Eileen M. Seiter was killed when the American Airlines plane on which she was a passenger crashed as it approached La Guardia Airport on February 3, 1959. Her administrators have brought this action for wrongful death and American has raised as an affirmative defense the limitation of liability provisions of the Warsaw Convention. . . ."

> "Under Article 3 (1) (e) of the Convention, an airline is required to deliver a passenger ticket which contains a 'statement that the transportation is subject to the rules relating to liability established by this convention.' The ticket before us did contain, in footnotes on the several coupons, such a statement (*supra,* pp. 1-2) but, as is apparent from inspection, *it is in such exceedingly small and fine print as almost to defy reading.* [*The court in a footnote 5 quoted with evi-*

* Notwithstanding the court's notation that certiorari had been granted herein.

dent approval Judge MacMahon's observations upon the unreadability of the ticket.] Thus, although there was literal compliance with the prescription of Article 3, the question arises whether such compliance satisfies the Convention's demands when viewed in the light of its overall purposes. We do not believe that it does. *In our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention.*" . . .

The New York Court of Appeals observed that the ticket before it was virtually identical with the *Lisi* ticket and held it insufficient. Commenting upon the decision of the Court of Appeals [C.A. 2] in *Lisi*, it said:

". . . And, even more recently, the United States Court of Appeals for the Second Circuit, confronted with the precise problem now before us, decided that a ticket, containing a statement (as to the carrier's liability) *virtually identical in content and form with that in this case,* failed to give passengers the notice required by the Convention. (See *Lisi* v. *Alitalia-Linee Aeree Italiane,* 370 F. 2d 508, cert. granted 36 USLW 3189.) After observing out (sic) that 'the Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier,' the court, in an opinion by Judge Kaufman, went on to say that 'the *quid pro quo* for the one-sided advantage is delivery to the passenger of a ticket . . . which give [s] him notice' of a 'very substantially' limited liability and affords him 'the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit' (pp. 512-513). Pointing out that the state-

ment on the tickets under consideration was printed in such a manner as to be virtually unnoticeable and unreadable, the court concluded, as already noted, that the tickets did not give the passengers the required notice."

The New York Court of Appeals also noted with approval the *Mertens* and *Warren* decisions:

"Other interpretations of Article 3 have also taken into account the fact that a traveler today is likely to undertake international travel quite casually and without realizing the drastically limited protection they are receiving when compared to that provided by domestic flights. (See *Mertens* v. *Flying Tiger Lines, Inc.*, 341 F. 2d 851 [2d Cir.]; *Warren* v. *Flying Tiger Lines, Inc.*, 352 F. 2d 494 [9th Cir.]"

The New York Court of Appeals then remarked upon the 1963 C.A.B. regulation requiring the conditions to be printed in large contrasting type:

". . . In addition, the Civil Aeronautics Board in 1963 adopted a regulation requiring (1) that the statement as to limitation of liability follow the far more clear and specific language specified by the Board; (2) that it 'be printed in type at least as large as ten point modern type [as contrasted with the 4½ poin' pe in this case] and in ink contrasting with the ock'; and (3) that a similar statement be placed at all ticket counters in letters at least one-fourth of an inch high (14 Code Fed. Regs., §221.175)" . . .

The New York Court of Appeals affirmed that the ticket is in conflict with our national policy:

". . . These decisions and regulations are suggestive of a national policy requiring that air carriers give pas-

sengers clear and conspicuous notice before they will be permitted to limit their liability for injuries caused by their negligence. An examination of the ticket forms which the respondent used, in the light of that policy, can only lead one to conclude that Mrs. Seiter was not sufficiently apprised of the consequences. . . ."

The Court, in striking the defense of Warsaw limitations of liability, concluded:

". . . Despite the fact that the Convention was applicable to her journey, the carrier's failure to give the requisite notice prevents it from asserting a limitation of liability. Accordingly, the plaintiff's motion to dismiss the third affirmative defense should have been granted." . . .

In *Warren* v. *The Flying Tiger Line, Inc., supra,* the Court of Appeals criticized the inadequacy of the ticket in that the conditions printed thereon "would be difficult for one to read the fine print on the back of these tickets without a magnifying glass." The court in *Warren* held that Article 3 should not be read alone, saying:

"But the provision in question does not stand alone. It is part of an Article of the Convention in which the particulars to be contained in the passenger ticket are spelled out in detail. *One of these particulars, contained in Article 3 (1) (e) is the inclusion of a statement '. . . that the transportation is subject to the rules relating to liability established by this convention.' The purpose of such a statement is to notify passengers of the applicability of the Convention,* thus affording them an opportunity to take steps to protect against the limitation of liability. The most common self-protective measure is, of course, the pro-

curement of additional flight insurance. See *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (C.A. 2)". (p. 497)

It is noteworthy that the Court in *Eck*, 15 N.Y. 2d 53, also stressed the necessity of having pertinent particulars stated in the ticket so that the passenger would have notice thereof:

". . . It cannot be implied, as such a change would take from the passengers, without notice, the very relief which the treaty gave them and intended that they continue to have . . ." (p. 61)

Axelrod v. *Incres Steamship Co.*, 363 F. 2d 531, C.A. 2, is apropos here. In that case the Court found the steamship ticket, which consisted of a mass of fine print, ambiguous, and the notice of the time limitation therein, insufficient. The Court held:

"Nothing in the remainder of the ticket dispels our initial confusion. At the end of the two-page finely written ticket appears the printed term 'The Carrier' —a term employed freely in the preceding *sixteen eye-defying paragraphs,* but never defined therein." (p. 533).

In *Lachs* v. *Fidelity & Casualty Co. of N.Y.*, 306 N.Y. 357, 364 (1954), the defendant unsuccessfully claimed the airline trip insurance contract did not apply to non-scheduled carriage. The Court observed that . . . "the average man . . . is (not) expected to carry the Civil Aeronautics Act or the Code of Federal Regulations when taking a 'plane".

B. *The Burden of Proof of Compliance is Upon Alitalia.*

The principle is well established that a party seeking to impose an unusual condition, such as a limitation of liability for negligence which is basically repugnant to our American system of jurisprudence, has the burden of showing that the transaction comes within the exception to the prevailing rule of law of unlimited liability for negligence. See *Santa Fe Ry.* v. *Grant Bros.*, 228 U. S. 177, 184 (1931); *Oceanic Steam Navigation Co.* v. *Corcoran*, 9 F. 2d 724 (C.A. 2, 1925); *The Majestic*, 166 U. S. 375, 385; *Conklin* v. *Canadian Colonial Airways, Inc.*, 266 N. Y. 244; *Kilberg* v. *Northeast Airlines*, 9 N. Y. 2d 34; *Rawson* v. *Pennsy. R.R. Co.*, 48 N. Y. 212; *Klar* v. *H.&M. Parcel Room, Inc.*, 270 A. D. 538, aff'd 296 N. Y. 1044. Compare insurance contracts, which are construed against the insurance company; *Lachs* v. *Fidelity & Casualty Co. of N. Y.*, 306 N. Y. 357; *Hartol Products Corp.* v. *Prudential Insurance Co.*, 290 N. Y. 44, 49.

The policy of the United States[4] was well expressed by this court in *Adams Express* v. *Cronyer*, 226 U. S. 491:

> "That a common carrier cannot exempt himself from liability for his own negligence or that of the servants is elementary" (p. 509). ". . . a contract of exemption from liability is against public policy and void" (p. 511).

Accordingly having claimed and pleaded the Warsaw limitation, the burden of proof is upon *Alitalia* that it has complied with all conditions precedent and that it has delivered a readable ticket to the passenger which clearly gives him notice of the limitation of liability. (See also *Notarian* v. *Trans World Airlines*, (1966 W. D. Pa., 9 Avi. 17,871).)

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[4] Cf. Federal Legislation such as Federal Employers Liability Act, Federal Tort Claims Act, Death in the High Seas Act.

The Warsaw Convention merely codified the basic rule of liability for fault. However it provided that if there was the prior delivery of a ticket-contract with the passenger containing the required particulars essential to its purpose as a contract including the vital noticeable and readable provision that the liability of the carrier was limited, then the carrier could invoke the limitation benefits of Article 22 (1). But in such event the passenger would then be in a position to take "self protective measures" such as "deciding not to take the flight, or entering into a special contract with the carrier (Article 22 (11)) or taking out additional insurance for the flight" (A. 95a).

In *The Majestic, supra,* p. 20, the United States Supreme Court held that the conditions or limitations are not part of the contract, and at best, merely constitute notices and, if not brought to the passenger's attention, were not binding upon the passenger unless specifically spelled out. See also *Oceanic* (*supra,* p. 20), which noted that the "common carrier and his customer do not stand on a footing of equality." 7 N. Y. Jur., CARRIERS, sec. 942 *et seq.*; 14 Am. Jur. 2d sec. 942 *et seq.*; 13 C. J. S. sec. 629 *et seq.*

C. *The Warsaw Convention Should be Liberally Construed in Favor of the Passenger.*

The above is particularly apt in view of it being a private law treaty serving the special commercial interests of the carriers. This Court has said: "It is the general principle of construction with respect to treaties that they shall be liberally construed." *deGeofrey* v. *Riggs,* 133 U. S. 258, 271; see also *Factor* v. *Laubenheimer,* 290 U. S. 276, 293. In *Neilson* v. *Johnson,* 279 U. S. 47, 52, which involved a construction of bilateral inheritance tax treaty, the Supreme Court held:

"The narrow and restricted interpretation of the treaty contended for by respondent . . . is not consonant with

the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties" (p. 51). "When a treaty provision fairly admits, of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred" (p. 52). "Where the meaning is uncertain, recourse may be had to . . . the parties own practical construction of it" (p. 52).

The fact that Alitalia has utilized tickets which have the surface appearance of compliance with the particulars required by Article 3 indicates a practical construction and basic acceptance by Alitalia of the fact that notice is required by the Convention.[5] Although as the court below has found, Alitalia did its best to conceal the notice from the passenger. Article 3 was in reality more honored in the breach and by lip service rather than by practical and effective notice in the ticket to the passengers.

Furthermore in similar situations the courts have chosen to interpret the Warsaw Convention in light of modern conditions in accordance with the general rule in International Law of *Rebus Sic Stantibus*, (Amer. Law. Inst. Restatement 2d. Ed. Foreign Relations Law, Sec. 153).

In interpreting the language of the Convention, the court, in *Eck* v. *United Arab Airlines*, 360 F. 2d 804, said:

"Conversely, the inquiry may lead the court to conclude that the language of the provision only imperfectly manifests its purpose, or that when the words were first chosen the language accurately reflected the provision's purpose but that today the same words imperfectly reflect this purpose because conditions have

[5] A practice long followed by IATA, see note 8, *infra*, p. 53.

changed in the area to which the words of the provision refer" (p. 812).

It should be noted that the New York Court of Appeals stressed the necessity of interpreting the Warsaw treaty in relation to our time. In *Eck* v. *United Arab Airlines,* 15 N. Y. 2d 53 the Warsaw Convention was interpreted in terms of contemporary conditions. The Court held:

"After reading all of the provisions of the Warsaw Convention and applying the purposes disclosed therein to the conditions under which the carriers operate in this Jet Age, . . ." (p. 57).

In reversing, the Court of Appeals observed that the Appellate Division had overlooked:

". . . the canon that, when a treaty is invoked, what is to be applied are its principles if its purposes are to be observed presently as in the past. . . . In doing this it must be recognized that the literal wording of one particularly applicable section of the entire treaty should not set the limits of our interpretive examination. (*Choctaw Nation* v. *United States,* 318 U. S. 423, 432 [1943.]) The proper procedure now is to examine the treaty as a whole, along with its history, and, in particular, to look into the problems which it was intended to solve" (p. 59).

II.

The Warsaw Limitation of Liability is Conditional and is Neither Automatic nor Self-Executing. Warsaw Merely Codifies Basic Law of Liability for Fault, Providing However That After a Prescribed Contract of Carriage Ticket Containing Essential Particulars Describing the Journey Including Adequate Notice of the Limitation of Liability has Been Made and Delivered to the Passenger, Then and Only After it has Fulfilled Such Pre-Conditions, may the Carrier Invoke a Limitation of its Liability.

A. *The Applicability of the Convention's Limitation Presupposes Prior Delivery of an Adequate Ticket-Contract As Provided by Articles 1, 3, 22(1) and 28.*

Alitalia in essence is seeking to subvert the basic purpose of the Convention. As stated by the Court below quoting from its prior opinion in the *Mertens* case:

> "The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit" (A. 96a).

Article 3 must be read with the other Articles of the Convention. A comprehensive reading establishes that limitation of liability is based upon the contract principle.

It is not automatic. It comes into play only after the prescribed contract is made with the passenger establishing, among other things, the international nature of the journey and giving readable and unequivocal notice that it is subject to the limitations of liability set out in the Convention. The ticket-contract must meet the requirements of Articles 1, 3, 22 (1) and 28.

In the "Scope-Definitions" of Article 1, it is provided that:

> "(2) . . . 'international transportation' shall mean any transportation in which, *according to the contract made by the parties*, the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, . . ."
>
> "(3) Transportation . . . by several successive air carriers shall be deemed, . . . to be one undivided transportation, if it has been *regarded by the parties* as a single operation . . ."

Obviously, the reference to "contract" necessarily refers to the ticket since only from this document can the passenger see what places, territories are involved in order to determine whether it is Warsaw transportation. The "contract" (or meaningful ticket) concept is repeated in Article 3 "Transportation Documents, Passenger Ticket" and in the venue provisions of Article 28 (to determine where action may be brought) and in the successive carriers provisions of Article 30, all of which presupposes the existence of a readable ticket intelligible to the passengers.

Also necessary to this scheme, are the provisions of Article 22 (1) where it is stated "Nevertheless by special contract, the carrier and the passenger may agree to a higher limit of liability." This provision would be meaningless if

the passenger had no prior notice on the ticket that the carrier's liability "was subject to the rules relating to liability established by this convention." This aspect was stressed by the Court of Appeals below.

The structure of Warsaw is skeletal. "The Warsaw Convention is by no means perfect. Either deliberately or by omission, a number of questions were left open which, according to the background drafting documents, would presumably be resolved by national law." (Sand: Air Carrier Limitation of Liability, 28 J. Air L. 260,267 n. 67; article cited in Opinion below. Articles 21, 22 (1) 24 (2), 25 (1), 28 (2) and 29 (2) explicitly refer to applications of national law. As hereinafter discussed the design of Article 3 in relation to the whole illustrates the foregoing perfectly in situations where the materiality is in issue of a particular omitted from the ticket, or made unreadable.

B. *The Difference in Drafting Between Article 3 and Articles 4 and 8 is Consistent With a Requirement in the Ticket of Notice of Limitation of Liability.*

(1) *As to Article 3* (*Passengers*): Article 3 provides that, "the carrier *must* deliver a passenger ticket which *shall* contain the following particulars": [The particulars required include the details of the contract and the notice essentials of Articles 1 and 22 (1)].

(a) "The place and date of issue"

(b) "The place of departure and of destination"

(c) "The agreed stopping places" (Note: As a means of helping to determine the international and Warsaw character of the transportation, as (b) above).

(d) "The name and address of the carrier or carriers" (Note: The application of Article 28 would require

the ticket to contain items (a), (b) and (d) in order to determine where the action may be brought).

(e) "A statement that the transportation is subject to the rules relating to liability established by this Convention." (The Court is respectfully referred to Point I hereof).

Subdivision (2) of Article 3 provides:

"(2) The absence, irregularity or loss of the passenger ticket shall not effect the existence or validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

This language eliminated the possibility of the carrier being deprived of its limitation defense by some slight clerical error or other minor irregularity, or by the inadvertent omission of an item non-essential to the particular transportation, or by the ticket being lost or not presented ("*absence*") at embarking. Flexibility was achieved in relating a fault in the ticket to its materiality in a given situation. See discussion of its history at Point III hereof, *infra*. But nevertheless a meaningful ticket be delivered to the passenger. It was thus left to the national courts when the situation arose, as it did in *Egan, Mertens, Warren* and in the instant case, to state what constituted delivery of an adequate ticket under the circumstances.

The necessity of clear notice in the ticket is implicit in the provisions of Article 22 (1) where it is stated "Nevertheless by special contract, the carrier and the passenger

may agree to a higher limit of liability." This provision would be meaningless if the passenger had no prior notice on the ticket that the carrier's liability "was subject to the rules relating to liability established by this convention." This aspect was stressed by both Courts below. See also *Egan, Mertens* and *Warren, supra.*

(2) *As to Articles 4 and 8 (baggage and goods):*

In the transportation of unaccompanied baggage or goods, on the other hand, certain specific particulars are necessarily explicitly stated to be minimal. In the case of baggage (Article 4), these particulars are a means of identifying the baggage owner by requiring the number of the passenger ticket to be written on the baggage check, and to determine the dollar amount of liability, by requiring the number and weight of the packages to be listed. The accompanying mandatory statement that the transportation is subject to the limitations of liability established by the Convention is particularly necessary so that it may be read with Article 22 (2) which describes the method of computing the dollar amount of damages in the case of loss of baggage or goods. Article 8 (the airway bill) is for similar reasons detailed as to the nature of the goods, the international character of the transportation, the identification of shipper the consignee and the first carrier, the weight and the quantity of the packages and the notice of limitation in order to determine the dollar amount of damages under 22(2), the person entitled thereto and the carrier liable.

C. *Alitalia's Assumed Posture of Resultant "Absolute Liability" Which is not an Issue Here.*

As a part of its "dire consequences" approach, Alitalia for the purposes of this appeal, claims "absolute liability

herein would follow from the decision below. This is not in issue nor was it raised in the original motion papers nor in the opposing affidavits, nor passed upon by the lower courts herein. With this reservation, plaintiffs respectfully submit that "absolute liability" does not necessarily follow and its application is far from clear. Having for many years at the exense of the passengers reaped the benefits of Warsaw limitations by means of a ticket that the courts have found more deceptive than informative, Alitalia is in no position to complain. However if it should prove necessary plaintiffs anticipate little difficulty in establishing that Alitalia was guilty of ordinary negligence or fault which caused the deaths and serious injuries suffered herein.

III.

The History of Article 3 Establishes that it was Designed to be Part of the General Pattern of the Traffic Documents' Notice Requirements Except That it Granted a Greater Flexibility to the Carrier if There was an Inadvertent Omission of a Non-Essential Particular Which Omission Would Not Otherwise Adversely Affect or Injure the Passenger.

A. *The Warsaw Conference of 1929 Retained the Basic Rule of "Liability Based On Fault"; its So-Called Shift of "The Burden of Proof" Made No Change of Substance.*

To begin with, it should be stated that none of the Courts reviewing Article 3 on this issue experienced any difficulty in holding that its evident import was that the ticket must contain a clear and readable notice to the passenger that the transportation was subject to the limitations of liability under the Convention. This was expressed in the decision of both Courts below and by the New York Court of Appeals in the recent *Egan* case and the courts in the *Mertens* and *Warren* cases.

In an effort to bolster its posture that only a blank boarding pass need be issued and that the limitations of liability are self-executing and automatically impinge upon the unknowing passenger, Alitalia claims that the drafting history of Article 3 points to a result contrary to the aforementioned decisions.

Plaintiffs respectfully submit that in actual fact the drafting history clearly points to a uniform purpose of required notice to the passenger or shipper. Alitalia's assertions to the contrary notwithstanding, the Warsaw Convention was conceived by European Government-owned and controlled air carriers with a view to primarily benefiting the carrier and not the passenger. It should be stated at the outset that the United States did not participate in the conference and only had an observer present, (Lowenfeld and Mendelsohn: *The United States & the Warsaw Convention*, 80 Harv. 497, 502).

The "one-sided" purpose of the conference delegates to favor the air carriers is evident from a reading of the Minutes of the Warsaw Conference in 1929.[5] As Rapporteur De Vos put it in his report to the Delegates:

> "These rules stemmed from the theory of fault in the liability of the carrier toward the passengers . . . (But) . . . The Conference had admitted that the carrier could be freed of all liability when he had taken all reasonable and normal measures to avoid the damage." (Warsaw Minutes, 7838, p. 15).

It is of particular interest that Rapporteur De Vos admitted that "the terms of the Convention are, practically,

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[5] Warsaw Minutes, ICAO Doc. 7838. The original Minutes of the Conference are in French. Quotations therefrom hereinafter made are in our own translations.

particularly favorable to the carrier." (Warsaw Minutes, p. 165)." . . . "The air carriers expect of us that we give them and the underwriters the juridical base of their exploitation." (id. pp. 16 and 17). ". . . the limitation of liability being fixed from the point of view of the carrier, . . ." (id. p. 159): The Italian delegate made an observation to the same effect: *Mr. Ambrosini (Italy)*: "The carrier is already benefiting from a special liability, according to the rules we have established and which represent a very large decrease of the liability vis a vis common law." (id. p. 68).

The Conference recognized the then current basic civil and common law, as imposing a strong presumption of liability against the carrier to the practical extent of assuring recovery by the passenger except for *force majeure* and contributory negligence.[6] (De Vos. id. p. 15-17). The so-called exchange of shift in the burden of proof from the passenger to the carrier for a ceiling of recoverable damages in the nominal sum of $8300 was in fact illusory. As far as the American passenger was concerned he already enjoyed under common law the doctrine of *res ipsa loquitur*. Nor could his right to fair compensation for injury from fault be taken away by a so-called contract

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[6] (Cohen: Negligence Law in Europe, 361 Ins. L.J. 82, Feb. 1953). See also George W. Orr: *Fault as the basis of Liability*, 21 J. Air L. & C. 399, 402 in which it is stated:

"Most nations using the Code System have imposed presumptive liability upon the common (including the air) carrier. . . . I would say from my wide international experience, rather than from actual research, that *the majority of nations impose presumptive liability*, although the definition of due care varies widely.

A good example of this degree of liability is included in the so-called Warsaw Convention of 1929 which has been accepted by most major nations of the world. The burden of proof is on the carrier to prove due care. *Being so near the code requirements of most adherents*, many nations have adopted the Warsaw standard of liability for their domestic and non-Warsaw standard to effect uniformity."

with the carrier. See *Conklin* v. *Canadian Colonial Airways*, 266 N. Y. 244; *The Majestic*, 166 U. S. 375 and cases cited at p. 20 hereof.

Another highly important right taken from the passenger was the universally recognized transitory nature of his right to bring action against the carrier wherever he could find him. Under Article 28, he became limited to a few selected places convenient to the carrier.

B. *The Requirements of Notice in the Ticket were Retained.*

It should be noted that in his preliminary report to the Conference, Rapporteur De Vos outlined the essentials of the proposed convention:

> "The essential thing, with regard to this, is the sanction, sanction provided for the three documents and which consists in withdrawing from the carrier who would transport passengers or goods without documents, or with documents not in conformity with the convention, the benefit of the advantages provided by the convention . . ." (Warsaw Minutes, p. 15).
>
> "A special document is provided for the transportation of passengers. This document is necessarily different from those used for the transportation of baggage and goods. *This passenger ticket shall only contain a minimum of particulars. On the other hand, the sanction for transportation of passengers without ticket or with a ticket not in conformity with the Convention, shall be identical with that provided for transportation of baggage and of goods.*" (pp. 160 and 161).

These observations with respect to the ticket were similar to the proposal of the Hellenic delegate for flexibility in the

ticket, accepted in principle by all the delegates when they adopted the final draft of Article 3.

The procedure adopted by the conference in reviewing the preliminary draft was for the various delegates to note written objections, amendments or proposals as to each item contained in this draft (id. p. 177). The work of the Conference was begun by the appointment of a preparatory commission to review suggestions under the chairmanship of Mr. Giannini, (Italy). Except for a basic question referring to the "economy" of the treaty all proposals and questions were regarded as procedural (Warsaw Minutes, pp. 22, 23 and 24). It is of particular note that in the Summary of Proposals or amendments made by the delegates to the various articles of the preliminary draft there were no amendments or proposals to eliminate the particulars required for the ticket under Article 3 except for the suggestion by the Greek Delegate of flexibility to allow for clerical error. There were no proposals from any of the delegates to eliminate the sanctions against the carrier as provided in the preliminary draft of Article 3. (id. p. 179, Summary of Proposals).

The Hellenic proposal with respect to Article 3 is set out in the Warsaw Minutes at page 196. It should be noted that the Helenic proposal did not eliminate sanctions but merely made the ticket more flexible if a particular was omitted by a clerical error and that particular was immaterial to the interests of the passenger. We quote from the Hellenic proposal beginning at page 196 of the Minutes:

> "It may happen, in fact, that due to a simple neglect, the carrier has omitted to mention in the passenger ticket the place of issue, or the point of departure or his name and address; or even that he keeps on the ticket his old address, or, finally that he does not point out

an intermediate stopping-place. These are, general, omissions of no great importance for the most part. . . ." (pp. 196-197).

The Hellenic proposal went on to say:

"If the omission is of no interest to the other party and causes no damage, how can this severe sanction of the carrier be justified? This sanction is only justified in case the omission of a particular would have caused a damage to the passenger, as it may happen under certain circumstances. But who shall judge if there is damage, because of this omission, to the other contracting party" (p. 197).

It is significant that the Hellenic proposal stated that it would be up to the Court to judge whether the omission from the ticket of an otherwise required particular caused damage to the passenger. In other words, it was the function of the court (as in this case) to determine the sufficiency of the ticket:

"Certainly it shall only be the court before which the case is brought which shall be able to give an appreciation" (p. 197).

It may also be noted in passing that the Japanese made comment on Articles 3 and 4 to the effect that inclusion of the clause concerning limitation of liability should remain compulsory (id. p. 201).

In reporting upon the few suggested amendments with respect to Article 3, and in commenting upon a proposal that a list of passenger names be required, Rapporteur De Vos stated that they would be included in the ticket particulars:

"These proposals (the passenger list) have been rejected, which does not mean that they (the names) will not, or would not appear on the passengers' document of transportation: in fact, these particulars are there" (id. pp. 100 and 101).

It is remarkable that the Rapporteur's summary of the Hellenic delegate's suggestion specifically noted that the required particulars would be retained, but that the air carrier would be relieved of the onus if the omission was insignificant:

"But in the face of an observation by the Hellenic Delegate, which reads as follows: The last paragraph of the article decrees the sanctions in case of absence of the passenger ticket, or when the passenger ticket does not carry all the particulars indicated, *from then on the sanction is too harsh, when there is a simple omission, a negligence of an employee of the company of transport—the commission has agreed with this viewpoint,* and in the last paragraph, it eliminated the words: 'or if the document does not contain the above particulars'.

But the consequences of this was that one had to be much stricter for those particulars imposed on the passenger ticket" (id. pp. 100 and 101).

The intention to retain the particulars in the passenger ticket was again illustrated by Rapporteur De Vos when he commented that the item "name and address of the carrier or carriers" should be retained in the plural rather than the singular, when he said:

"In reality, if we accepted this change, action in liability in favor of the passengers would become impossible. Therefore the Commission has retained the present text" (id. 100).

In the discussion on the baggage check, following the discussion on the ticket, the mandatory presence of the particulars on the ticket was assumed when it was stated by De Vos: ". . . the baggage ticket bears the number of the passenger ticket, and the passenger ticket contains the indications concerned" (id. p. 104). De Vos equated the notice requirements in both documents:

> "The Commission felt that it was preferable to put under letter h) the following article *which imposes the obligation to put on the passenger ticket a clause stipulating that the transportation is subject to the terms of liability established by the present convention.* As for the obligatory mentions, the commission decided to reduce to a bare minimum these obligatory letters d), f), h). This refers to the 3rd paragraph relating to the sanction for omission of particulars on the document. The last paragraph has not been changed as in *Article 3, i.e., we have maintained the same sanction of errors* in the particulars, but it only concerns, as obligatory mentions, letters d), f), h)" (id. pp. 104 and 105).

That the purpose of sanctions as to the ticket was retained was indicated in the description of its similarities to the airway bill by the Rapporteur:

> "For Article 8, the same observations were presented as for *Articles 3 and 4* concerning the particulars which *must appear* on the document of transportation." ". . . The reason which exists in *Article 3* to maintain the words "or the carriers" does not exist here, due to the fact that the recourse for goods is different from the recourse for passengers" (id. pp. 105 and 106).

The discussion, in the last session on October 10th, immediately prior to the adoption of the final draft of

Article 3 throws further light in the general understanding of its import. It was stated by Mr. Youpis (Hellenic Republic) that sanctions would continue to be uniform as to all traffic documents.

> *Mr. Youpis—(Greece)*—"In the first paragraph of this Article (3), it says: 'a statement that the transportation is subject to the rules relating to liability established by this convention.' This particular also figures in Article 8, concerning the waybill; but in Article 4, paragraph 2, letter h) the formula says: 'under the terms of this convention.' *I believe we should adopt a uniform formula.*"
>
> *Mr. Giannini—(Italy)—President of the Commission*: —"As I have warned you, as we go along and examine each Article, we shall eliminate the small errors which may have slipped in. We tried to use a uniform language, but if something escaped us, please call it to our attention. *Of course the formula must be the same all over.*"
>
> *The President*—"Nobody wants the floor? I put Article 3 to a vote" (adopted). (id. pp. 129-130).

It was observed by the Swiss delegate during the discussion of the particulars that should be embodied in the passenger ticket that all necessary information should be there in clear and self-evident form:

> "... *we must enlighten the public, it should not have to go to the companies of air navigation* to ask them: how do you do it? *The public is not going to go to the company of air navigation to say: give me your general conditions, so that I can see if I am protected. It does not cost anything to add a line if it will avoid a misunderstanding* ..." (id. 103).

As the Italian delegate put it in discussing the necessity for flexibility with respect to the ticket "I think it better to give some indications and allow practice to develop." . . . "We have before us a new mode of transportation." (Warsaw Minutes pp. 103 and 104). Mr. Giannini, President of the Commission, had expressed the same thought: "The Convention was designed to be as flexible as possible" (id. p. 23).

The foregoing analysis of the history of Article 3 is supported by Goedhuis' own report of the proposal of the Hellenic delegate which is made at page 152 of his book:

> "With regard to this article, the delegate of the Greek Government at the Warsaw Convention pointed out that the sanction provided in the case under (2) would be much too rigorous *if the carrier had omitted to put down the place of issue or the place of destination, or his name and address, just through carelessness.* How could this severe sanction against the carrier be justified *if the omission was of no interest to the other party and of no injury to him?*"

C. *The Hague Protocol is Immaterial Herein.*

The defendant has attempted to make capital out of the fact that Hague Protocol amending the convention (not adhered to by the United States) makes a drafting change in Article 3, specifically excluding the limitations of liability for failure to state essential items in the ticket.

A reading of the minutes of the Hague Meeting will show that the change in the Hague Protocol as to Article 3 was due to the realization that the technique as originally suggested by the Hellenic delegate of leaving to a local court the issue of whether an omission was material may

have created differences of application and approach in various national courts. There was almost unanimous agreement of the Hague delegates that requirement of notice to the passenger should accordingly be made more explicit. It was thus decided to adopt the American suggestion to specifically provide for greater uniformity of drafting among all the traffic documents. What was predicted by the American delegates (remarks of Mr. Calkins at page 116 of Minutes of 1955 Hague Conference, ICAO Document #7686-LC/140) and others as to the requirements of the American Courts with respect to notice came to pass in *Lisi, Egan, Mertens* and *Warren* as soon as the specific point had been properly put into issue before the Court.

In any event, the Hague Article 3 differs from the present Article 3 in many material respects to the degree that a true comparison is beside the point. The changes made were in keeping with the real purposes of the Hague Conference which was not to benefit the passenger but to plug up holes, real or fancied, in the current Convention and make it more airtight against the passengers, throwing them a sop of an additional $8000 which was meaningless in terms of the values otherwise involved. The wilful misconduct clause (article 25) was amended to insure that the limitation of liability was impregnable, short of proving intent to murder. The Hague Article (3) specifically provided that the ticket constituted "*prima facie* evidence of the conclusion and existence of the contract of carriage". This in effect shifted the burden of proof of delivery of an appropriate ticket from the air carrier to the passenger and still left the carrier with all its defenses including limitation of liability. Small wonder that the United States refused to adhere to it.

IV.

The Decision Below is in Accord With the Position of the Civil Aeronautics Board and the United States Public Policy.

Alitalia claims that the passenger tickets herein were approved as to form and content by the C.A.B. citing *Pan-American World Airways, Inc.*, 24 CAB 575 (1957), which claim has been rejected by the United States Government *Amicus* brief. In that proceeding, the C.A.B. limited itself to approving, as to participating American carriers, the IATA interline resolutions and agreements. However it specifically criticized the ticket in its Order E-11024 appended to its decision, expressly observing also at p. 577 that approval of the resolution did not constitute approval of the legal effect of the ticket. The Board did not purport to "pass on the size of the type . . . or other typographic details the airlines should employ in printing the required warning regarding limited liability . . . Indeed the print on the ticket here is far smaller than that used in the report. . . ." (U.S. brief p. 8). See also Opinion below commenting upon C.A.B. policy at footnote 10, (A. 99a).

In its Order No. E-1944, Docket 14411, adopted on April 1, 1963, referring to agreement C.A.B. No. 10559, R-2, relating to the form of passenger ticket and baggage check, the C.A.B. said:

> "Insofar as applicable to the notice provisions now appearing in the ticket, the Board stated (1) *the type in which the ticket notice is currently printed on the ticket is too small to alert passengers to the importance of the matter*, and (2) *that the monetary limit of liability for death or injury does not appear in the notice.*

Therefore, in conjunction with the proposed amendment of Part 221, the *Board will re-examine its approval of the IATA Agreement* relating to the form of tickets and baggage checks (Agreement No. CAB 10559 (R-2)."

This order refers to previous Order E-11024, which had been previously adopted on February 21, 1957, contained in 24 CAB 575, *supra*. In the above referred to Docket 14411, dated April 1, 1963, the C.A.B. also proposed to add a new paragraph (j) to Title 14, C.F.R. §221:38 which now provides for a notice of limitation of liability for injury or death under the Warsaw Convention, specifically stating:

"Notwithstanding the provisions of the paragraph (h) of this section; each air carrier and foreign air carrier shall publish in its tariffs a provision stating whether it avails itself of the limitation on liability to passengers as provided in Article 22 (1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention including the amount of the liability limit in dollars. Where applicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added."

It is clear from the foregoing that the C.A.B., had not approved this ticket as such, but had found the same faults with it as have our courts in *Lisi, Egan, Mertens* and *Warren*. See also 14 C.F.R. 221.175 in which the CAB specified that at least 10 point modern type in contrasting ink be employed.

The ATA and IATA Joint *Amici* brief at p. 15, n. 21 attaches thereto as Appendix E, the so-called "Passenger Ticket—Conditions of Contract", which it asserts was submitted to the C.A.B. in connection with 24 CAB 575, *supra*. Appendix E which is obviously not the ticket, is nevertheless self-defeating here. It is respectfully submitted that this Appendix E further exposes the speciousness of the air carrier argument. This "Conditions of Contract" Exhibit as submitted to the C.A.B., consumes six legal-size pages of incomprehensible equivocating legalisms. All this was further compounded when these six pages of conditions were reduced to an eye-defying "thicket of Lilliputian print" squeezed into a space on the ticket measuring 2¾ inches by six inches. (See reproduction of the actual ticket "Conditions of Contract" herein. A. 78a).

V.

Alitalia's Claim For a Jury Trial is Belated and was Waived. The Parties had Agreed to Treat the Question As a Matter of Law. In any Event the Ticket was Insufficient As a Matter of Law.

Alitalia for the first time at Point V of its brief now claims that the readability of the ticket should be decided by a jury. As was specifically noted in the majority opinion: "The parties have agreed that this is a question of law for the court to decide" (A. 98a). Alitalia's position in its briefs below (repeated in page 25 of its present brief) was that as a matter of law, the ticket need not contain any information; that it could deliver any paper amounting to a blank "Boarding Pass", that the limitations of the Convention "applies automatically" in a Warsaw transportation. The Court of Appeals below held the ticket defective as a matter of law:

> "We agree (with Judge MacMahon) that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice." (A. 76a).

To the same effect were the holdings in the *Egan, Martens* and *Warren* decisions.

VI.

In Any Event, Even if the Ticket and Baggage Check Were Noticeable and Readable, the Ticket Lacks an Unqualified Notice that the Transportation is Specifically Subject to the Warsaw Convention.

The DiSclafani Ticket Suffers From a Further Deficiency.

A.

It is respectfully submitted that the statement on the tickets was defective in that it was unnoticeable, unreadable, and even if it could be read, it did not clearly and unequivocally state that the journey was subject to the rules of limitation of liability of the Warsaw Convention, Article 3(1)(e). It would take a highly specialized international air transportation lawyer to determine from the ticket, even if it could be read, whether the Warsaw Convention applied, much less the average passenger.

As the court below said of the ticket:

> "Moreover, even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon." (A. 98a).

Drion, an airline lawyer, felt obliged to state in his book:

> "Whether the transportation is international, the passenger—who anyhow should be an expert in the Warsaw Convention—can easily determine with his knowledge of the places of departure and destination and the agreed stopping places, assuming that he knows by heart the countries which have ratified the Con-

vention. *Preposterous as these assumptions are, they are not much more unrealistic than the idea that by telling a passenger in a printed clause that the rules of liability of the Convention will apply to his carriage, he would have any clear ideas about his legal rights.* With this requirement we are in the fairyland of legal thinking, where fairy passengers will thoroughly study all the fine print on their tickets before embarking on the plane. . . . It has been said that the IATA formula is an evasion of the Convention and that it is meaningless, because it merely states that the Convention applies when it applies . . ." (p. 105).

Westminster Bank Ltd. v. *Imperial Airways, Ltd.*, 2 All Eng. Law Reports 890 (1936), 1936 U.S. Av. Rep. 39, is directly in point. The defendant received three bars of gold worth £9,138 for transport London to Paris. The consignment note had the following on the back thereof:

"Carriage by Air: The general conditions of carriage of goods are applicable to both internal and international carriage. These general conditions are based upon the Convention of Warsaw of October 12, 1929, insofar as concerns international carriage within the special meaning of the Convention."

The Westminster Court held:

"In my opinion a statement that the carriage is subject to certain general conditions of carriage of goods which general conditions are based upon the convention is not a statement that the carriage is subject to the rules relating to liability established by the Convention. To say that certain conditions are applicable to the carriage, is, in my opinion a very differ-

ent matter from saying that the Convention governs the carriage" (p. 897).

The court allowed plaintiffs the full value of the gold bars even though no special declaration of value thereon had been made by the shipper (p. 897).

To the same effect is *Phillipson* v. *Imperial Airways*, (1939), Appeal Cases, 332,345, in which the court similarly found that the air consignment note failed to comply with the notice requirements of the Convention and allowed full recovery. The above English cases thus agree in principle with the American rule. In *Petition of The Dodge, Inc.*, 282 Fed. 2d 86, 89 (C.A.2, 1960) the court said:

> "However, we think that ambiguous language in statutory provisions relating to limit here of liability should be resolved in favor of interpretations increasing instances where full recoveries from the limiting vessel are possible."

See also *Rawson* v. *Pennsylvania R.R. Co.*, 48 N.Y., 212, and *General Precision* v. *Burnham Service*, 46 Misc. 2d 586.

B. *Imputed Knowledge Requires Notice In The Official Language of the Country Where The Ticket Is Issued. (Assuming The Question To Be Reached).*

As to the *DiSclafani* passengers (*Como*), it is respectfully submitted that in order to charge them with imputed notice of the conditions of the contract that conditions of contract must be in the official language of the country where the ticket was issued, which was indisputably Arabic in this case. Assuming, but not conceding that the Warsaw Convention limitation would be otherwise applicable to the DiSclafanis, the ticket contract as to them is defec-

tive since it is written in a language other than the official language of the country where the ticket contract was issued and made. (A. 162).

See *Nejat* v. *British Overseas Airways Corporation*, 9 Avi. 18,154, California Superior Court, San Francisco County, April 28, 1966, which held that: the liability limitation contained in an air transportation ticket which was printed in English and which was issued in Iran was contrary to public policy and unenforceable because not made in the language of the country in which issued. Inherent in the concept of "notice", whether the purpose of the notice is the attempted limitation of a carrier's liability or to comply with due process in service by publication, is the implied condition that the notice must be in "communicable form" to the public of the country involved. See *New York Central Railroad* v. *Fraloff*, 100 U.S. 24.

VII.

The Foreign Authorities and Cases Cited by Alitalia Are Not in Point. The *Amici* Briefs Supporting Alitalia are Cumulative.

Alitalia refers to books written by Goedhuis, Shawcross and Beaumont and Drion. It is questionable whether they would qualify as disinterested legal scholars. Alitalia cannot deny that they have variously served principals (whose interests as to Warsaw were in limiting liability), such as International Airlines, or their European Government owners, or their insurers.

Dr. Goedhuis' book was published in 1937 when international air transportation was in its infancy and court decisions were sparse. As its title suggests, Goedhuis was primarily concerned with comparing the air legislation of

various countries with t e Warsaw Convention in an effort to expand the Convention's acceptance. As stated in his preface, his book was an outgrowth of his report to the International Air Traffic Association, the purpose of which was to push the adoption of the Warsaw Convention by all countries. At page 14 of the Alitalia brief, an excerpt from Goedhuis is cited. However his comments clearly relate to the form rather than the substance of the ticket as he states later on in the same page 157:

> "The principles which must regulate the question of traffic documents in the Warsaw Convention are the following:
>
> 1) the carrier must make use of traffic documents in the form prescribed by the Warsaw Convention.
>
> 2) the carrier must bear the consequences of damage sustained by a passenger or consignor arising from an omission or irregularity on these documents, due to the fault of the carrier."

As Goedhuis states in a footnote to the paragraph excerpted by Alitalia: ". . . the question of whether the carrier will be liable for damage sustained by a passenger due to faulty wording will be solved by common law, . . . there is no doubt the carrier will have to repair the damages inflicted on the passenger." (p. 153).

H. Drion, at one time, was an attorney long associated with KLM Airlines. His book, published in 1954, could not have considered the *Mertens* and *Warren* decisions. The excerpt quoted by Alitalia from *Drion* at page 14 of its brief does not assist it. Apart from the fact that Drion like the other author cited was performing a special pleading, he cites two inapplicable decisions as authority for the excerpt quoted by Alitalia. *Grey* v. *American*

Airlines which was rejected as inapplicable by the Court below; and *Pauwels* v. *Sabena*, 1950 U.S. Av.R. 367. The *Pauwels* case decided in 1950 by a Belgian Court did not involve the points here at issue. *Pauwels* involved a claim that the limitation clauses did not bind the passengers heirs. The readability of the ticket was not raised. As we previously noted at page 45 hereof, Drion has himself admitted that the ticket with its "fine print" is a "fairy-land" of unintelligibility.

Shawcross and Beaumont's long association with British air carriers or their insurance carriers is well known. Unfortunately, the latest edition of this book does not contain any reference to or discussion of *Mertens, Warren* or the District Court decision in *Lisi*, the only other decisions which have any real relevance to the issues involved herein. Examination of the sections of the book cited by Alitalia reveals that apart from the flat statement made by the authors that there is a distinction between Articles 3 and 4, there is no reasoned discussion nor reference to pertinent authority.[7]

The *Grey* case cited at page 12 of Alitalia's Brief was distinguished by the Court below in this and in the *Mertens* case. *Grey* was solely concerned with whether the omission in the passenger ticket of certain "agreed stopping places" as provided in Article 3 (1) (c) was fatal to the carrier. This relatively minor omission obviously did not affect the international character of the transpor-

[7] But see Beaumont: *Anomalies in the Warsaw Convention*, 14 J. Air L. & Co. 30, 34 in which he says: "When, however, we read Article 3 in conjunction with Articles 4 (4) and 9, it seems reasonable to conclude that, in order to preserve his rights under Articles 20, 21 and 22, all the carrier need do is to deliver a ticket, perhaps including *printed rubrics* for the particulars set out in Article 3 (1), (a) to (e), but without the necessity to have had any of these completed, except perhaps (e) *which would obviously be printed in any case.*"

tation in its flight from New York to Mexico, with the intermediate domestic stops of Washington and Dallas. Nor did it have any causal connection to the issue of notice to the passenger of limited liability under Warsaw as here. The *Preston* case cited by Alitalia at page 13 was concerned only with omission of certain intermediate "agreed stopping places" en route from London to Kenya and suffers from the same inappositeness as *Grey* upon which it relies. The *Montague* case cited at page 33 was concerned with goods. An interesting point was made by the Court for liberally construing a traffic document, when it said:

> "The reason is because it may be beyond the wit of any clerk to know in some cases whether the carriage is international carriage or non-international carriage. If you look at the definition of international carriage in the Convention you will see that it is a most complex definition."

The issue of notice or readability was not present in the lower court *Eck* decision and the *Manufacturers Trust,* cited at p. 33, case was sent back for trial on the issue of notice. However to the extent, if any, that it may be pertinent, *Manufacturers Trust* has in effect been overruled by the recent N.Y. Court of Appeals decision in *Egan,* supra. The *Seth* case, decided by the First Circuit, is concerned solely with the adequacy of the baggage check, which is not in issue here. The *Seth* case involved baggage and goods and not passengers. The issue of readability was not there raised. Whatever its shortcomings, it is consistent with the general American rule recognizing the principle of limited liability or released value with respect to baggage and cargo but not with respect to

people. *Conklin* v. *Canadian Colonial Airways, Inc.*, 266 N.Y. 244.

The cases cited by Alitalia and by its *amici* Brief supporters on the rules for construction of a treaty do not assist it. The *Amiable Isabella* case cited in Alitalia Brief page 18 contains a quotation out of context. In that case which was decided in 1821 the United States claimed that a foreign vessel captured by an American privateer was not within the protection of a treaty with Spain because the vessel was not properly documented to show nationality. The captor claimed that the ship and cargo were in fact British although disguised as Spanish. (p. 66). The following significant language was omitted by Alitalia:

> "We are to find out intention of parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and stop where that stops, whatever may be the difficulties or imperfections it leaves behind." (p. 71).

Since the claimant in the *Amiable Isabella* could not show strict compliance with the treaty and with forms of proof of Spanish nationality as the treaty required, his claim of immunity thereunder was rejected and the claims of the American privateer to ship and cargo were upheld (p. 76). Similarly here the burden of proof is upon Alitalia to show full compliance with Warsaw treaty before it may invoke its privileges and immunities.

The *Maximov* case cited and quoted out of context by Alitalia at page 17 of its brief is similarly *inapropos*. There the issue was "whether an American Trust whose beneficiaries are British subjects and residents which returns capital gross income realized in this country is exempt from Federal Income Tax on gains by virtue of a

provision of the Income Tax Convention between United States of America and the United Kingdom." The Convention provided that a resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States Tax on gains from the sale or exchange of capital assets. The primary point involved was that the court in limiting the application of the treaty to a true British resident was concerned with the purpose of the treaty as well as the language and applied the rule that in claiming exemption or benefits therefrom the treaty would be strictly construed against such claimant. Similarly Alitalia claiming benefits or exemption from liability for its negligence under Warsaw by the rules of construction must have the treaty strictly construed against it.

The *Factor* case cited by Alitalia at page 17 involved an extradition treaty with England and the rule of construction stated there favors the plaintiffs herein, see *supra*, p. 21.

The *Valentine* case cited at page 17 of Alitalia's Brief involved an extradition treaty. In essence *Valentine* holds that the claimant of a right under treaty must show a specific grant of these privileges. The *Neilson* case cited at page 28 favors the plaintiffs. See reference thereto, *supra*, p. 21. The *Santovincenzo* case cited at page 17 of the Alitalia brief involved the application of a provision of a United States-Persia treaty under a favored nation clause of the United States-Italian treaty concerning the right of the Italian Consul to unclaimed property of a deceased Italian national in the State of New York. The court found no warrant for a "restricted interpretation" but looked to the treaty as a whole (p. 39).

The *Amici* briefs: The Briefs filed by the various *Amici* on behalf of Alitalia's position merely repeat the argu-

ments of Alitalia.[8] The reference to the Article by *Lowenfeld* and *Mendelsohn: The United States and the Warsaw Convention,* 80 Harv. L. Journal 497, as making a comment that Judge MacMahon's decision broke a chain of hundreds of precedents is extremely selective. The fact of the matter is that the Article did not cite a single case in support of this statement and apparently did not fully evaluate the *Lisi, Mertens* and *Warren* decisions. The Article deals mainly with the events leading to the denunciation of Warsaw by the United States and the later withdrawal of such denunciation. It should also be stated that there is no admission by the plaintiffs that the tickets contained the notice prescribed by the inapplicable Hague Protocol, as claimed at page 11 of the joint ATA-IATA Brief.

The briefs make reference to the Montreal agreement pursuant to which the airlines persuaded the United States to withdraw its denunciation of Warsaw by agreeing to file tariffs raising limits to $75,000 in terms of liability. However these tariffs are not treaties and may be withdrawn by any of the carriers upon due notice and furthermore the agreements apply only to trips touching upon the United States. (See opinion of court below, note 7.)

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[8] IATA's position is contradicted by its own Attorney Julian S. Gasdik, in his article on this type of ticket: *The New Contract between Air Carrier and Passengers,* 24 J. Air L. 86. 151, 153, (1957). Speaking of the so-called limitation of liability reference in the "Conditions of Contract" Mr. Gasdik acknowledged the mandatory require of notice to the passenger of the limitations of liability when he stated:

> "The first sentence is inserted in order to comply with para. 1 (e) of Article 3 of the Warsaw Convention requiring that the ticket shall contain a statement that the carriage is subject to the rules relating to liability established by the Convention. An earlier form of ticket was held not to comply with this requirement.". (Citing the *Westminster Bank* case, noted herein, *supra,* p. 45.

Conclusion

WHEREFORE, it is respectfully submitted that the judgments of the Court below be affirmed.

Respectfully submitted,

THEODORE E. WOLCOTT,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

vs.

JOHN LISI, etc., *et al.*,

Respondents.

BRIEF FOR THE AMERICAN TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE*

SAMUEL LANGERMAN (President,
American Trial Lawyers Association),
WALTER H. BECKHAM, JR. (Chairman,
Aviation Law Section),
Counsel for *Amicus Curiae*,
American Trial Lawyers Association,
Concord Building,
66 West Flagler Street,
Miami, Florida 33130.

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BRIEF FOR THE AMERICAN TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE*

The American Trial Lawyers Association respectfully submits this brief *amicus curiae* in support of the respondents pursuant to Rule 42 of this Court's revised rules in that on January 11, 1968, Theodore E. Wolcott, Esq., attorney for the respondents gave his written consent to the filing of this brief, and on January 5, 1968, George M. Tompkins, Esq., of the firm of Condon & Forsyth, Esqs., attorneys for petitioner Alitalia consented in writing to the filing of said brief.

Interest of *Amicus Curiae*

The applicant has an interest in this case in that it is a national bar association with over 25,000 members who are trial lawyers primarily engaged in the practice of tort law. The Aviation Law Section of the Association consists of a substantial number of trial attorneys who specialize

in aviation accident law. These practitioners represent injured airline passengers and the estates of deceased passengers in actions currently pending in both state and federal courts throughout the country. Many of these pending cases involve the Warsaw Convention (49 *Stat.* 3000-3026) and, therefore, are concerned with the same question currently before this Court, to wit, may an airline avail itself of the limitation on damages contained in Article 22 of the Convention by delivering a ticket to the passenger which contains a confusing and meaningless reference in Lilliputian-sized print to the Warsaw Convention?

Summary of Argument

The policy underlying the Convention requires that the passengers be given notice of the fact that their right to receive compensation for death or injury is being radically curtailed.

Certain foreign governments and their airlines are attempting to delude the Court by claiming dire consequences will follow an affirmance.

POINT I

Affirmance of the opinion below will be in furtherance of the Convention's policy of providing notice to passengers that their rights are being limited, thus affording them the opportunity of taking self-protective measures. The disasterous consequences which foreign airlines predict will follow in the wake of an affirmance are non-existent.

Despite the plethora of self-serving declarations on the part of the airline industry to the effect that the Warsaw Convention gives great benefits to passengers, it is recognized that the Treaty's "true inspiration and *raison*

d'être'' is the limitation of liability. Cabranes, *Limitations of Liability in International Air Law: The Warsaw and Rome Conventions Reconsidered,* 15 Int'l. & Comp. L. Q. 660, 671 (1966); see also: Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 499 (1967).

The benefits allegedly afforded passengers by the Convention are: (a) the creation of a cause of action; (b) a presumption of liability against the airline; (c) jurisdiction in the United States over foreign airlines; and (d) protection against low limits applicable at the place of the accident. However, an examination of American cases shows these alleged benefits to be illusory.

With respect to the creation of a right of action, it has been held that the Convention does *not* create a cause of action. *Noel* v. *Linea Aeropostal Venezolana,* 247 F. 2d 677 (2d Cir.), *cert. denied,* 355 U. S. 907 (1957).

As to the presumption of liability or shift in the burden of proof, since the doctrine of *res ipsa loquitur* is now generally applied to an unexplained airplane accident (W. Prosser, Torts 220-21, 3 Ed. 1964) this ''benefit'' conferred upon the passenger by the Convention is theoretical at best.

Similarly, with regard to jurisdiction over foreign carriers, the advent of state long-arm statutes with their broad ''doing business'' tests, means that the possibility of foreign carriers avoiding jurisdiction in American courts, in the absence of the Convention, is not a real one. ''The only accomplishment of Article 28 was to *preclude* jurisdiction over foreign carriers in a certain number of cases where an action could have been brought if Warsaw had not been applicable.'' (Emphasis added.) Lowenfeld & Mendelsohn, *supra,* 80 Harv. L. Rev. at 526.

Finally, as to the protection against limits lower than that contained in the Warsaw Convention, in view of cases

such as *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961), *Babcock* v. *Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279 (1963), and *Griffith* v. *United Air Lines, Inc.*, 416 Pa. 1, 203 A. 2d 796 (1964), in which the old doctrine of *lex loci delictus* has been abandoned, the fear that without the Convention American courts would apply low limits of liability to claims of American citizens on accidents occurring abroad has been largely dispelled.

Thus, the only viable benefit granted to anyone by the Convention is that afforded to the carrier, *viz.*, the limitation of damages for personal injury or death to the sum of $8,300. The Second Circuit in its opinion below correctly interpreted the Convention, and the policy underlying it, when it held that as a *quid pro quo* for this "one-sided advantage" there had to be notice to the passenger that "on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash is limited very substantially." 370 F. 2d at 513. This must have been the policy behind Article 3, else why its language to the effect that non-delivery of a ticket will render the limitation inapplicable, but at the same time not affect the applicability of the rest of the Convention?

Foreign international carriers argue that without the protection given them by the Convention's limitation, the economic impact upon them would be "catastrophic." The specter of airlines having to fold their wings, as it were, because of victims of air crashes receiving full compensation for their injuries is absurd when viewed in the light of the practical realities of the industry and its insurance practices.

In the more than 35 years that have elapsed since the drafting of the Convention, international aviation has grown from an infant—arguably worthy of special protection—to a giant fully capable of safeguarding its investment. Forty million international passengers are carried

every year.[1] Commercial aviation can no longer be considered an "ultra-hazardous" activity.

The experience of domestic American carriers, who operate under a system of "unlimited" (i.e., actual provable) damages is noteworthy. Not only are they thriving under this system, but the cost of a domestic passenger ticket per mile is actually *less* than the cost of an international ticket covering the same distance.[2] Since the price of the international ticket is presumably based in part upon the limited liability of the carrier, it is obvious that risk exposure has little effect on either the price of air transportation or its profitability.

The claim on the part of the international carriers that in the absence of the Convention's limitation of liability they would have to pay much higher insurance premiums and sharply raise the price of tickets, is untrue. The cost of the additional insurance premium per passenger on a flight of 3,000 miles from London to New York, has been computed to be 96 cents. Lowenfeld & Mendelsohn, *supra*, at page 556. Furthermore, the cost of such additional premiums will still leave the percentage of the carrier's total operating cost alloeable to insurance far below that allocable to advertising. *Ibid.*, n. 189.

That the foreign governments which control many of the international carriers, are not above resorting to thinly veiled threats of some sort of reprisal is evidenced by the following quotation:

> "If the decision of the majority of the Court of Appeals is to be confirmed the Government of the United

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[1] Canadian Yearbook of International Law 1966, at p. 206.

[2] For example, the distance from New York to Salt Lake City is approximately the same as that from New York to Caracas, Venezuela. The cost of an economy one-way ticket on the purely domestic Salt Lake flight is $119, whereas the cost of the Warsaw flight to Caracas is $175.

> Kindom is concerned that it shall have to take appropriate action to protect its carriers from the unlimited liability ensuing therefrom." Page 8, Brief for the United Kingdom as *Amicus Curiae* in support of the petition for a Writ of *Certiorari*.

What is the United Kingdom threatening to do? Certainly not the cessation of flights to the United States. No one is forcing British carriers to fly to America; they come to this lucrative market because they find it profitable to do so.

The shock expressed by the United Kingdom at the opinion below is curious indeed in view of the fact that "English authorities hold that a carrier failing to deliver a sufficient ticket remains *prima facie* liable; it is not entitled to the benefits of the Convention but is subject to its liabilities." *Warsaw Convention-Limited Liability-Avoidance*, 33 J. Air L. & Com. 478, 479 (1967):

> "Westminster Bank, Ltd. v. Imperial Airways, Ltd. (1936), 2 All E. R. 890 . . . involved a failure to deliver an air consignment note that listed all the particulars required by the Convention, rather than an inadequate delivery of a passenger ticket, but the statements that outline limited liability and avoidance of liability apply equally to a failure to comply with the ticket requirements and the air consignment note requirements. In giving judgment for the plaintiff the court held that under the Warsaw Convention the carrier is prima facie liable for injuries that occur during the course of transport, that the carrier can avoid this liability through Article 20, *but* that it is absolutely and unlimitedly liable if it fails to deliver an adequate air consignment note. *See also* Philippson v. Imperial Airways, Ltd. (1939), 63 Lloyd's List L. R. 119." *Ibid.*

Alitalia claims that the results of an affirmance would be "devasting." What is so devastating about an airline having to print a larger ticket with a readable notice of the limitation of damages?

It has been the Warsaw Convention, with its archaic limitation on damages for death, which has proved "devastating" to the rights of American citizens. It has stripped them of their right to receive adequate compensation for their injuries, and, up until the opinion below, without the necessity of an effective notice to this effect.

When Alitalia failed to deliver a ticket to the passengers containing adequate notice of the limitation on damages, it made it impossible for them to take self-protective measures. "The passengers were thereby deprived of a right which was intended to be afforded them as a concomitant to the carrier's right to limit its liability." *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494, 498 (9th Cir. 1965).

The fact is that the ticket at bar leaves the passenger in the dark as to a serious risk which he cannot appreciate.

The decision below correctly construed a treaty which derogates the private rights of passengers, and in so doing both the District Court and the Court of Appeals have at one and the same time rectified a long-standing injustice and fulfilled the intent of the drafters with respect to giving reasonable notice of the Convention's limitation of liability. To reverse their holdings would be a retrogressive step in treaty construction and would result in irreparable harm to respondents and countless other air travellers similarly situated.

CONCLUSION

The opinion below should be affirmed.

Respectfully submitted,

SAMUEL LANGERMAN (President,
American Trial Lawyers Association),
WALTER H. BECKHAM, JR. (Chairman,
Aviation Law Section),
Counsel for *Amicus Curiae*,
American Trial Lawyers Association,
Concord Building,
66 West Flagler Street,
Miami, Florida 33130.

Certificate.

This is to certify that on the 7th day of February, 1968, copies of the above brief as *amicus curiae* were served by mail pursuant to Rule 33 (1) upon Austin P. Magner, Esq., One Rockefeller Plaza, New York, New York, attorney for petitioner Alitalia-Linee Aeree Italiane, S.p.A., and Theodore E. Wolcott, Esq., 36 West 44th Street, New York, New York, attorney for respondents John Lisi, *et al.*

WALTER H. BECKHAM, JR.

SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A., PETITIONER

v.

JOHN LISI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
PHILIP A. LACOVARA,
Assistant to the Solicitor General,
MORTON HOLLANDER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

JOSEPH B. GOLDMAN,
General Counsel,
Civil Aeronautics Board,
Washington, D.C. 20428.

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In June 1967, at the invitation of the Court, the government filed a memorandum suggesting that the decision below was correct.[1] That memorandum also pointed out that the Civil Aeronautics Board had not purported to pass upon, much less to decide, the size of type face or other typographical details which the airlines should employ in printing the warning re-

[1] In a memorandum filed on December 22, 1967, in response to an invitation from the Court in *Berguido* v. *Eastern Airlines, Inc.*, No. 528, this Term, the government reiterated its position that a ticket purporting to warn of limited liability under the Warsaw Convention does not of itself comply with Article 3 of the Convention if printed in type too small to attract reasonable notice.

quired with respect to limited liability under the Warsaw Convention. In light of the fact that the briefs of petitioner and others urging reversal, filed since the Court granted the petition, contain various statements as to the meaning and effect of the Board's past actions and its authority over the subject matter of the notice requirement, we submit this memorandum to clarify the Board's role in this area.

The air carriers have at no time presented for Board approval any agreement relating to the size of type to be utilized in relation to any matter appearing on a ticket, either generally or in relation to the Warsaw Convention. Prior to the accident here involved, the Board, pursuant to the provisions of Section 412 of the Federal Aviation Act, 49 U.S.C. 1382, had regularly approved agreements containing the language in which the warning regarding limited liability was couched, and also had accepted for filing various tariff rules containing such language. As far as the Board was concerned, however, the carriers were at liberty to utilize any type they chose, and otherwise to determine the typographical manner in which the warning was given. Furthermore, the Board had not at any time expressed any views on the size of type necessary to give adequate notice to the public. It was not until 1964 that the Board imposed a requirement for minimum type size and for use of contrasting ink and stock with respect to such warning. Even then, that requirement was imposed primarily under the tariff filing provisions of Section 403, of the Act, 49 U.S.C. 1373, and did not purport to represent any Board determination that the Warsaw Convention requires

either larger or smaller type. While the views of the Board as the agency charged with regulating air transportation under the Federal Aviation Act might be persuasive with respect to what constitutes adequate notice under the Warsaw Convention, the Board has not taken the position that the adjudication of this matter is within its primary expertise, nor has it acted on such a premise. The Board recognizes no reason why the question of what the Warsaw Convention requires may not be decided judicially as an independent matter.

I

An understanding of the nature and effect of the Board's actions will be facilitated by a brief description of the statutory provisions involved. Section 412 of the Federal Aviation Act requires that air carriers file with the Board copies of their agreements with other carriers which affect air transportation, and directs the Board to disapprove any such agreement which it finds to be adverse to the public interest or in violation of the Federal Aviation Act. If the Board does not make such findings, the statute directs the Board to approve the agreement. A consequence of approval is to relieve the carriers involved from the restraints imposed by the antitrust laws and related statutes.[2]

The Board asserts the authority to impose, as a condition of its approval of a particular agreement, qualifications which it deems necessary to safeguard the overall public interest. In this way the Board

[2] Section 414, 49 U.S.C. 1384.

on occasion may require action which it could not otherwise demand. Since, however, hundreds of agreements are filed each year, the Board is not in a position to explore exhaustively the legality of particular agreements under other laws (including treaties), or to focus upon every conceivable circumstance in which the public interest might be served through the attachment of conditions.

Additionally, Section 403 of the Act requires that carriers file their tariffs with the Board. Under familiar principles, provisions for exculpation from liability may be included therein and, in appropriate circumstances, have the force of law. (The Board ordinarily accepts for filing those tariffs which conform to its rules, and the mere acceptance of a tariff constitutes no determination as to the lawfulness of any provision contained therein.) Furthermore, the implementation of an agreement between carriers on the subject of rates or liability may depend on the filing with the Board of tariffs embodying the agreed-upon rate or exculpatory provision.

Finally, Section 204 of the Act, 49 U.S.C. 1324, vests in the Board the broad investigative and rule-making authority necessary to the discharge of its duties.[3]

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[3] Section 204(a) provides (49 U.S.C. 1324(a)):

> The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act.

II

In 1949, the Board had before it the initial IATA Traffic Conference resolutions establishing a uniform passenger ticket, baggage check, and air waybill, as well as IATA's proposed conditions on liability for injury to passengers, baggage and cargo in international transportation. Included in the liability provisions was a proposed warning to be placed in the carriers' tickets to give notice of the Warsaw Convention.[4] The carriers represented, and the the Board agreed, that the adoption of uniform ticketing and interline arrangements between carriers would produce significant benefits to the traveling public, and on the basis of these considerations the Board approved the use of a uniform ticket, *IATA Traffic Conference Resolutions,* 10 C.A.B. 783.[5] There was, however, no request that the Board approve any particular size for the ticket or the type, and indeed it appears that not even a specimen ticket was pre-

[4] The proposal provided: "(4) that the Conditions of Contract on the inside cover of the Passenger Ticket and Baggage Check read as follows:

"*Conditions of Contract*

* * * * *

"(2) (a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called 'the Convention') unless such carriage is not 'international carriage' as defined by the Convention. (See Carrier's tariffs for such definition.)"

[5] See pp. 2 and 3 of the Joint Brief of ATA and IATA in this Court, pointing out the advantages of a uniform ticket.

sented for the Board's consideration.* On the contrary, the resolution in terms provided "(3) that the questions of language and size be left to each member." The Board's opinion contains no reference to the proposed language relating to the Warsaw Convention, and in dealing with other proposed exculpatory conditions the Board made plain that it was not attempting to pass upon the requirements of the Convention. Rather, the Board pointed out (10 C.A.B. at p. 787) that the carriers had "represented * * * that these resolutions are not in abridgement of" the Convention, but rather that their purpose was "to place the same ceiling on liability in non-Warsaw air transportation as is provided under the Warsaw Convention * * *." Although the Board found (*id.* at p. 788) that this proposal was "a step away from the public policy of this country" with respect to carrier liability, it accepted most of the details of the conditions of carriage, including the provision relating to notice (footnote 4, *supra*), subject to further study on the part of the carriers and action by the Board. In addition, the "notice" provisions were later included in various tariffs filed with the Board, but there was no Board tariff rule then in force specifying the size of type to be utilized in the warning notice.

In 1954, the IATA carriers submitted additional resolutions relating to the uniform ticket and the limitation of liability for international passengers. One such resolution contained the warning language in substantially the same form as the 1949 resolution.

*The entire agreement filed with the Board, including the warning provision, was typed in 10 point size type.

After the over-all resolution had been initially disapproved on various grounds, see Order E–8543, 24 C.A.B. 580, informal conferences were held and the Board approved as not adverse to the public interest an amended resolution containing a notice and various other exculpatory provisions. *Pan American World Airways, et al., Conditions of Carriage,* 24 C.A.B. 575.[7] As pointed out by the Joint Brief of ATA and IATA before this Court, the Board stated that the revised notice provision had been improved. However, the Board again was explicit in declaring that its action did not constitute determination of compliance with the Warsaw Convention.[8] Furthermore, the carriers did not request Board approval of any ticket form as such, or of any proposal with respect to the size of type to be utilized therein.[9]

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[7] Again, the agreement filed with the Board, including the Warsaw Convention notice, was typed throughout in 10 point size type.

[8] In the one area in which a Warsaw compliance problem was discussed, the Board clearly distinguished between the "public interest" standard of the Federal Aviation Act and the provisions of the Convention, 24 C.A.B. at p. 577:

> [T]he Board's approval merely finds as not adverse to the public interest an agreement between the carriers to insert in their conditions of contract a provision that the agreed stopping places for the purpose of the Convention shall be the scheduled stopping place on the passenger's route shown in the timetables, and is in no sense a determination by the Board that such provision meets the requirement of the Convention that the agreed stopping places be contained in the ticket.

[9] We believe it is misleading for ATA and IATA in their Joint Brief to assert that at the time of approval the Board had before it a specimen ticket disclosing the size of type to be employed and to create thereby the inference that the Board approved such size. A specimen ticket was attached to a reso-

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No. 70

IN THE

Supreme Court of the United States

October Term, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

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REPLY BRIEF FOR THE PETITIONER

Respondents' brief has failed to meet the fundamental issue of the meaning of the Warsaw Convention[1] as written. Respondents argue, in complete disregard of the plain language of the Convention, that the provisions excluding or limiting liability do not apply unless the passenger has been given "notice". In the alternative, they argue that the Warsaw Convention is only a skeletal document into which the requirement of "notice", necessary to limit one's liability under national law, should be read. This position of respondents is in direct conflict with the clear wording of the Warsaw Convention, its drafting history, and the long-standing practice and understanding of the Parties, including the United States.

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, *et seq.*

Regardless of how respondents veil their argument, they are asking this Court to approve an amendment of the Warsaw Convention by judicial decision.

We shall deal, in this reply brief, with the basic errors in respondents' brief.

1. Article 3(2) of the Warsaw Convention in plain, simple, concise language, states that a carrier shall not be entitled to avail itself of the provisions of the Convention which exclude or limit liability "if the carrier accepts a passenger without a passenger ticket having been delivered."[2] This is the only circumstance mentioned in Article 3(2) justifying the imposition of this sanction. Nevertheless, respondents argue, and the Court below has held, that this sanction applies, not only in cases of non-delivery, but also where the delivered ticket does not notify the passenger that the Treaty limits the carrier's liability. This argument and the holding of the Court below are in direct conflict with the clear meaning of the terms of the Convention. The Warsaw Convention, as a Treaty and a contract among nations, must be interpreted according to its terms.[3] As was stated in *Valentine* v. *United States*, 299 U.S. 5 (1936):

> *"These must be fairly construed, but we cannot add to or detract from them."* 299 U.S. 5 at 11.

The words of a treaty:

> *"are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any arti-*

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[2] 49 Stat. 3015.

[3] *Maximov* v. *United States*, 373 U.S. 49 (1963); *Valentine* v. *United States*, 299 U.S. 5 (1936); *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931).

ficial or special sense impressed upon them by local law, unless such restricted sense is clearly intended." [4]

It is clear from a comparison of the plain language of Articles 3(2), 4(4) and 9 that the Parties to the Convention intended to limit the imposition of the sanction in Article 3(2) solely to cases of non-delivery of the passenger ticket.[5] For, while Articles 3(2), 4(4) and 9 all impose the same sanction for non-delivery, Articles 4(4) and 9 *in addition* expressly extend the sanction to cases where the baggage check or air waybill omits certain specified particulars listed in Articles 4(3) and 8. The drafters were meticulous in specifying those particulars which they intended to be compulsory in the baggage check and air waybill. Article 4(3) lists eight items for inclusion in the baggage check; Article 4(4) imposes the sanction if the baggage check omits any one of three of the eight particulars listed in Article 4(3). Article 8 lists seventeen particulars for inclusion in the air waybill; Article 9 imposes the sanction in the event the air waybill omits any one of ten of the seventeen particulars listed in Article 8.

In the case of the passenger ticket, however, no comparable language extends the sanction in Article 3(2) to cases where the delivered passenger ticket omits any of the five particulars listed in Article 3(1). Article 3(2) specifies non-delivery as the sole basis for the imposition of the sanction.

2. The argument of respondents and the holding of the Court below that the sanction in Article 3(2) applies, not only where no passenger ticket is delivered, but also where the delivered passenger ticket omits any of the particulars

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[4] *De Geofroy* v. *Riggs*, 133 U.S. 258, 271 (1890).

[5] 49 Stat. 3015-17.

listed in Article 3(1), are in direct conflict with the long-standing understanding of the Parties to the Warsaw Convention, including the United States. In 1955, based upon a proposal by the United States, Article 3(1) was amended to require the inclusion in the passenger ticket of a notice that the Treaty limits the carrier's liability, and the sanction in Article 3(2) was amended to extend to cases where the delivered passenger ticket fails to contain this notice.[6]

Although the Hague Protocol did not come into effect until August 1, 1963, is not in force as to the United States,[7] and does not apply to the case at bar,[8] the Court below has read the Hague Protocol requirement of "notice" into the unamended Warsaw Convention and has applied the Hague Protocol sanction against the petitioner. As characterized by Judge Moore in his dissenting opinion:

> *"The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability."* 370 F.2d 508 at 515 (A. 101a).

3. The drafting history of the Convention confirms the intent of the Parties that the sanction in Article 3(2)

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[6] II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 pp. 2-3 (1956). The Hague Protocol amending the Warsaw Convention has never been ratified by the United States and is not in force as to the United States. S. EXEC. DOC. H, 86th Cong., 1st Sess. (1959); S. EXEC. REPT. No. 3, 89th Cong., 1st Sess. (1965).

[7] S. EXEC. REPT. No. 3, 89th Cong., 1st Sess. p. 2 (1965).

[8] The transportation and accident involved occurred on February 25-26, 1960 (A. 12a).

be limited solely to cases of non-delivery of the passenger ticket. The preliminary draft of the Convention contained identical sanctions with respect to the passenger ticket, baggage check and air waybill. In this preliminary draft the sanction applied not only for non-delivery of the transportation documents, but also for the failure of the document to contain certain particulars.[9] Before final adoption of the Convention, however, the delegates deleted the language in Article 3(2) which would have extended the sanction to cases where the delivered passenger ticket omitted any of the listed particulars.[10] Comparable language, extending the sanction to cases where the baggage check and air waybill omit certain particulars, was retained in the final draft of Articles 4(4) and 9.[11]

Confronted with the plain language of the Convention and its drafting history, respondents, in an attempt to cast doubt upon the clearly expressed intent of the Parties, have confused the significance of statements contained in the Minutes of the Warsaw Conference. At page 32 of their brief, respondents quote excerpts from the Warsaw Minutes in support of their argument that the sanctions for the passenger ticket, baggage check and air waybill were intended to be identical. This was the *original* intention of the Parties. The statements quoted by respondents were made solely in reference to the preliminary draft of the Convention.[12] The objectives represented by

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[9] IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838 pp. 167-9 (1930). This document contains all of the recorded Minutes of the Warsaw Conference, and will be cited hereinafter as *"Warsaw Minutes,* ICAO Doc. 7838". The Minutes are recorded in French and all translations in this reply brief are the petitioner's.

[10] *Warsaw Minutes,* ICAO Doc. 7838, pp. 100-101, 129.

[11] *Warsaw Minutes,* ICAO Doc. 7838, pp. 104-8, 130-33.

[12] *Warsaw Minutes,* ICAO Doc. 7838, pp. 14-17, 159-176.

these preliminary remarks were later abandoned by the delegates. See the brief for the petitioner, pages 19-24.

Similarly, respondents have confused the scope of the Greek proposal which ultimately resulted in the restriction of the sanction in Article 3(2) to cases of non-delivery. The amendment to Article 3 proposed by the Greek delegate would have left to the courts the determination of whether the omission of any of the particulars from the passenger ticket resulted in damage justifying the imposition of the sanction.[13] The precise Greek proposal was not acceptable to the Conference, although the *principle* that the sanction should not apply for the mere omission of any of the listed particulars from the passenger ticket was adopted.[14]

Respondents state at page 37 of their brief:

> "It was stated by Mr. Youpis (Hellenic Republic) that sanctions would continue to be uniform as to all traffic documents."

To support this statement, respondents quote from the Warsaw Minutes certain remarks made by the Greek and Italian delegates. Clearly, these remarks do not lend any support to the statement of respondents. The quoted remarks were made in the course of final editing of the Convention by the delegates. The wording of the same particular contained in Articles 3(1)(e), 4(3)(h) and 8(q) of the final draft of the Convention was not identical. Articles 3(1)(e) and 8(q) referred to the liability rules "*established by* this Convention." Article 4(3)(h), however, referred to the liability rules "*under* this Convention." The remarks quoted by respondents refer only to

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[13] *Warsaw Minutes*, ICAO Doc. 7838, pp. 196-7.

[14] *Warsaw Minutes*, ICAO Doc. 7838, p. 101.

the desire of the delegates that identical language be used in all three Articles in describing the same particular.[15]

4. In their attempt to inject a notice requirement into the Warsaw Convention, respondents have urged an alternative ground. They say, in effect, that although there is no notice requirement in the Warsaw Convention, the Treaty is only a skeletal document into which a requirement of notice *should* be read, consistent with national law. If this were done, the fundamental objective of the Convention of establishing uniformity of the law in international air transportation would be subverted. This would also conflict with the official view of the Government of the United States that:

> *"its objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention."* [16]

The Parties to the Warsaw Convention were determined to avoid the resolution of any substantial issue by resort to national law. Early in the Conference, the delegate for Italy stated:

> *"In all cases we must keep away from the redress to national law."* [17]

The delegate for France summed up the consensus of the Conference most emphatically when he stated:

> *"We will make every effort to find a formula which gives satisfaction, but it is well understood, that from*

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[15] *Warsaw Minutes,* ICAO Doc. 7838, p. 129.

[16] DEP'T STATE PRESS RELEASE, No. 111, May 14, 1966.

[17] *Warsaw Minutes,* ICAO Doc. 7838, p. 44.

now on, we are absolutely opposed to a formula which will go back to the application of national law. It is the first time that one calls for the application of the national law and if one allows it on this question it will be called for on others. From our point of view we would also come to the destroying of the agreement, if one established the resorting to national law on each article.

* * * * *

[B]ut I beg the delegates not to enter on to this dangerous path which consists of reserving the solution of the litigation to national law." [18]

Where the Parties did agree to leave the resolution of any question to national law, an express reservation to that effect was provided in the Warsaw Convention. Such an express reservation appears in Article 21 (effect of contributory negligence of the injured person),[19] Article 22 (form of payment of damages and conversion of French francs into national currency),[20] Article 24 (persons who can bring suit under Article 17 for injury to or death of passengers),[21] Article 25 (conduct equivalent to wilful misconduct),[22] Article 28 (procedural questions in any action for damages brought under the Convention)[23] and Article 29 (method of calculating period of limitation for bringing suit.)[24]

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[18] *Warsaw Minutes*, ICAO Doc. 7838, p. 45.

[19] 49 Stat. 3019.

[20] 49 Stat. 3019.

[21] 49 Stat. 3020.

[22] 49 Stat. 3020.

[23] 49 Stat. 3020-1.

[24] 49 Stat. 3021.

No similar reservation is made in Articles 3 and 4. Nevertheless, respondents argue, in effect, that although there is no requirement of notice in the Warsaw Convention, the Convention should be read to permit each nation to decide for itself whether a notice of the limitation of liability should be required, the form of the notice, and whether the sanctions in Articles 3(2) and 4(4) should apply in the absence of such notice. This is an invitation to chaos in the interpretation and application of the Treaty, almost certain to result in as many separate and diverse decisions as there are Parties to the Treaty. Such a course would clearly lead to the destruction of the fundamental purpose of the Treaty of establishing and preserving uniformity in international private air law.

5. The position of respondents, and the decision of the Court below, are predicated upon national concepts of "notice" applicable where liability is sought to be limited by contract. In the same vein is the recent case of *Egan* v. *Kollsman Instrument Corp.*, 36 U.S.L.W. 2441 (N.Y. Dec. 28, 1967). Distracted by such concepts, applicable where national law governs, the Court below and respondents have failed to recognize that at issue here is not national law, but an *international* compact, a treaty among nations which supersedes any notion of national law. The *amici curiae* briefs filed in support of respondents suffer from the same defect.[25] At best they present arguments that, in view of the low limitation of liability established by the Treaty, "notice" of this limitation *should* be required. This is not the proper forum for such arguments. Moreover, "notice" of the Treaty limitations of liability can be made part of the law of the United States simply by the ratification of the Hague Protocol. These argu-

[25] Filed by the Airline Passengers Association, American Trial Lawyers Association, Bates Block and Arnold Holtzman.

ments, therefore, should be presented to the Executive and Legislative Branches of the United States Government as grounds for the ratification of the Hague Protocol.

Of course, any nation can, consistent with the Warsaw Convention, take whatever steps it considers necessary to bring to the attention of its nationals the fact that the Warsaw Convention may be applicable to their transportation and may limit the carrier's liability. This is precisely what the Civil Aeronautics Board has done in the United States.[26] The Board has taken steps within its jurisdiction to bring to the attention of American travelers the fact that the Warsaw Convention exists, that it may apply to their transportation and that it limits the carrier's liability. As the Civil Aeronautics Board recognizes, however, these efforts are independent of the Treaty and its requirements.[27]

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[26] See, 14 C.F.R. § 221.175.

[27] See the Memorandum for the Civil Aeronautics Board as *Amicus Curiae*.

CONCLUSION

The heart of this case is the Treaty and the fundamental question is whether a Court of the United States can write into a treaty a provision which the parties themselves had expressly rejected—whether international commitments of the United States should yield to concepts of national law. It is perhaps this question and its implications which prompted three of the Parties[28] to the Warsaw Convention to file briefs in this Court as *amici curiae*, stating that the decision of the Court below is in direct conflict with the clearly expressed intent of the Parties to the Convention and the continuous practice and understanding of the Parties since the Treaty was adopted.

The judgments of the Court below should be reversed, and the cause remanded with instructions to deny plaintiffs' motion for partial summary judgment.

Respectfully submitted,

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

THOMAS J. WHALEN,
of counsel

February 27, 1968

[28] Canada, Italy and the United Kingdom of Great Britain and Northern Ireland.

Certificate of Service

I hereby certify that I have this 27th day of February, 1968, served the foregoing Reply Brief for the Petitioner upon respondents, the International Air Transport Association, the Air Transport Association of America, the United States, Canada, the United Kingdom of Great Britain and Northern Ireland, the Republic of Italy, Airline Passengers Association, American Trial Lawyers Association, Bates Block, and Arnold Holtzman, *amici curiae*, by depositing same in the United States mailbox at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid addressed to the respective attorneys of record as follows:

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10015

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

WILLIAM A. JENNINGS,
FLOYD A. DEMANES
Counsel for Airline Passengers Association
1860 El Camino Real-Penthouse
Burlingame, California 94010

ROBERT MAC CRATE
Counsel for Canada
48 Wall Street
New York, New York 10005

EDWIN LONGCOPE
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

ALFRED C. CLAPP
Counsel for the Republic of Italy
744 Broad Street
Newark, New Jersey

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

SAMUEL LANGERMAN
WALTER H. BECKHAM, JR.
Counsel for American Trial Lawyers Association
Concord Building
66 West Flagler Street
Miami, Florida 33130

LEE S. KREINDLER
Attorney for Bates Block
99 Park Avenue
New York, New York 10016

.....

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

SUPREME COURT, U. S.

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AFTER ORAL ARGUMENT.

B. NATHANIEL RICHTER,
CHARLES A. LORD,
ARTHUR G. RAYNES,
121 S. Broad Street,
Philadelphia, Pennsylvania,
Attorneys for Petitioners.

Of Counsel:
SEYMOUR I. TOLL

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AFTER ORAL ARGUMENT.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd by Their Guardian, MARION J. BERGUIDO, Petitioners, respectfully move for leave to file a brief amicus curiae after oral argument in the above captioned action and represent as follows:

1. That they are petitioners in No. 528, October Term, 1967 in this Honorable Court in which action their Petition for Certiorari is presently pending.

2. That oral argument was held on March 11, 1968 and there is presently pending for decision the case of *Alitalia-Linee Aeree Italiane, S. P. A. v. John Lisi, et al.*, October Term, 1967, No. 70.

3. Having been requested by this Court for his views on the *Berguido* Petition for Certiorari, the Solicitor-General, in his brief *amicus curiae,* suggested that the outcome of the *Berguido* Petition for Certiorari should abide the outcome of the *Lisi* case here.

4. Assumedly on this recommendation of the Solicitor-General our Petition for Certiorari in *Berguido* has not been acted upon as yet.

5. We attended and audited the oral argument in *Lisi* which was held on March 11, 1968.

6. Based upon the numerous questions propounded by your Honorable Court, and based upon the answers and statements of both counsel at the oral argument of *Lisi,* we respectfully submit that the very question which is at the heart of the *Berguido* Petition for Certiorari, and the very question which was supposed to be foreign to the *Lisi* case, now occupies a central place in *Lisi*:

What are the legal consequences which flow from a ticket legally inadequate under the Warsaw Convention?

7. Not only is this issue now clearly present in *Lisi* and *Berguido,* but your petitioners are in complete disagreement with the statement of counsel for *Lisi* that the only issue with respect to the adequacy of a Warsaw ticket is whether it is legible or not. Your petitioners believe that in order for a Warsaw ticket to be legally adequate it must not only be clearly and immediately legible, but it must also comply with Chapter II, Article 3(1) of the Warsaw Convention in all other respects. In particular, your petitioners take the position that the ticket must contain the agreed stopping places (Article 3(1)(c)), for the passenger is exposed to in-

creasing risks with each additional landing and take-off. Carlos Berguido was killed at a stopping place which was not on the ticket issued to him. In addition, your petitioners submit that the ticket must specifically point out the drastic limitations which Warsaw imposes on a passenger's rights. Not only was the *Berguido* ticket less legible than the *Lisi* ticket, and not only did it fail to name the agreed stopping place where Berguido was killed, but the *Berguido* ticket gave your petitioner's decedent even less information about the drastic limitations of Warsaw than the *Lisi* ticket did. In fact, the *Berguido* ticket gave no information about any limitations at all.

8. Before the disposition of the Petition for a Writ of Certiorari in what is now No. 70 (*Lisi*) had been ruled upon, your petitioners moved to consolidate their case—No. 528 (*Berguido*) with *Lisi*.

9. Your petitioners' Motion for Consolidation was based on the close connection between what we believed was an important issue in both *Lisi* and *Berguido*, namely, the effect of non-compliance with the ticketing provisions of the Warsaw Convention. We respectfully submit that the oral argument in *Lisi* has fully confirmed our belief.

10. Respondent in *Lisi* opposed our Motion for Consolidation in a brief it filed in *Berguido* on essentially the ground that the issues raised by your petitioners in *Berguido* were foreign to those in *Lisi* where there was allegedly simply the question of legibility of the ticket.

11. Your petitioners' Motion for Consolidation with *Lisi* was denied assumedly for the reason asserted by the respondent in *Lisi*.

12. In our Memorandum in response to the Solicitor-General's Memorandum for the United States as *amicus curiae* in *Berguido* we respectfully suggested at page 3 the following possibilities in the event of an affirmance of *Lisi*:

> "If this Court decides that the *Lisi* ticket is legally inadequate, the trial court in *Lisi* will have to decide whether (1) the trial should proceed on the issue of damages alone—as we contend—; or (2) whether the trial should proceed with the defendant permitted to establish 'that it took all appropriate measures to avoid the injury'—as *Mertens* holds and the Solicitor General contends; (3) or whether the plaintiff in *Lisi* must bear the burden of proving negligence—as the *Berguido* Court of Appeals held."

13. This question, which is now clearly present in *Lisi*, may well be dispositive of *Berguido*, and yet your petitioners in *Berguido* have not been heard on its merits even though they may be bound by the disposition of this question in *Lisi*.

14. We respectfully submit that if all that will be decided in *Lisi* is the issue of the adequacy of the ticket, there is for *Lisi* and numerous other pending and future Warsaw Convention cases as well, the genuine prospect of continued litigation and appeals on the question of the consequences of an inadequate ticket.

15. As matters now stand, neither the question of adequacy of the ticket on grounds other than illegibility nor the consequences of a legally inadequate ticket have been briefed or argued on the merits by the parties which did raise them (your petitioners) while the *Lisi* parties, who disclaimed these issues, have had oral argument on them.

16. That the following important reasons exist for the granting of this motion.

I. Despite the fact that the oral argument of *Lisi* suggested how well-founded was our Motion to Consolidate, your petitioners in *Berguido* have never been given an opportunity to state their position and the reasons therefor on the questions now clearly involved in *Lisi*.

II. Your petitioners are in fundamental disagreement with the construction of Warsaw which both counsel in *Lisi* have presented to your Honorable Court. To grasp just how deep our disagreement is we respectfully refer the Court to pages 9-34 of our Petition For Certiorari in *Berguido*.

III. The questions now before your Honorable Court are large and important enough to merit a full expression of views from all the parties who will be affected by their resolution. Your petitioners in *Berguido* stand in no less a position than the Solicitor General and a host of public and private international air carriers who have been given full opportunity to submit briefs *amici curiae* in *Lisi*.

WHEREFORE, your petitioners respectfully move that their Motion be granted.

Respectfully submitted,

B. NATHANIEL RICHTER,
CHARLES A. LORD,
ARTHUR G. RAYNES,
Attorneys for Petitioners.

Of Counsel:

SEYMOUR I. TOLL

REME COURT, U. S.

No. 70

FILED
APR 19 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
One Rockefeller Plaza
New York, New York 10020
Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioner respectfully prays the Court to grant a rehearing in this cause.

I.

As far as can be determined, this is the first time in its history that the Supreme Court has been unable to decide the meaning of a *treaty* of the United States.[1]

---

[1] The case was argued on March 11, 1968. The equal division of the Court was announced March 25, 1968. The judgment reads:

"Per Curiam.

"The judgments are affirmed by an equally divided Court.

"Mr. Justice Marshall took no part in the consideration or decision of this case."

At issue here is the meaning of Article 3 of the Warsaw Convention,[2] a treaty of the United States and the supreme Law of the land.[3]

This Court observed in *Sullivan* v. *Kidd*[4] that "the construction of a treaty is judicial in its nature."[5] As the final arbiter of the meaning of treaty obligations of the United States, this Court must ensure that they are adhered to "in the utmost good faith" and that they "are faithfully kept and observed."[6] No effort has ever been spared by this Court, no avenue has been left unexplored, in arriving at the meaning of a treaty of the United States.[7]

In the past where there has been apparent difficulty in reaching a decision in a treaty case, the Court has ordered reargument. See, *Factor* v. *Laubenheimer,* 290 U.S. 276 (1933); *Jordan* v. *Tashiro,* 278 U.S. 123 (1928); *Sullivan* v. *Kidd,* 254 U.S. 433 (1921).

Surely the reasons which prompted reargument in those cases are no less compelling in this case.

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929. 49 *Stat.* 3000 *et seq.;* T.S. 876.

[3] U.S. CONST. art. VI, cl. 2.

[4] 254 U.S. 433 (1921).

[5] *Id.* at 442.

[6] *Id.* at 439, 442.

[7] For example see, *Corbett* v. *Stergios,* 381 U.S. 124 (1965); *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961); *Bacardi Corp.* v. *Domenech,* 311 U.S. 150 (1940); *Valentine* v. *United States,* 299 U.S. 5 (1936); *Factor* v. *Laubenheimer,* 290 U.S. 276 (1933); *Cook* v. *United States,* 288 U.S. 102 (1933); *Santovincenzo* v. *Egan,* 284 U.S. 30 (1931); *Nielsen* v. *Johnson,* 279 U.S. 47 (1929); *Jordan* v. *Tashiro,* 278 U.S. 123 (1928); *Terrace* v. *Thompson,* 263 U.S. 197 (1923); *Sullivan* v. *Kidd,* 254 U.S. 433 (1921); *Charlton* v. *Kelly,* 229 U.S. 447 (1913).

II.

The equal division of the Court indicates that agreement upon the meaning of Article 3 of the Warsaw Convention cannot be reached upon the basis of the language employed.

Where this apparent difficulty has arisen in prior cases, the Court has explored the negotiations leading to the making of the treaty, the conditions existing at the time and the purposes sought to be achieved.[8] In *Factor* v. *Laubenheimer*, 287 U.S. 713 (1933), for example, shortly after argument the Court requested reargument and directed the attention of counsel to "the available diplomatic correspondence" pertaining to the treaty involved.

The Court has also placed considerable reliance upon the practical understanding of the parties to a treaty in ascertaining its meaning. At the Hague Conference in 1955 the parties to the Warsaw Convention had considered it necessary to amend the treaty to (1) require notice of its applicability and (2) impose the non-delivery sanction of Article 3 in the absence of such notice in the passenger ticket.[9]

With respect to the views of the United States, submitted at the petition level, the Memorandum for the United States did not address itself to the meaning of the

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[8] See, *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961), *Valentine* v. *United States*, 299 U.S. 5 (1936), *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933), *Cook* v. *United States*, 288 U.S. 102 (1933), *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931), *Nielsen* v. *Johnson*, 279 U.S. 47 (1929) and *Terrace* v. *Thompson*, 263 U.S. 197 (1923).

[9] II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, pp. 1-3 (1956). See also, I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, pp. 124, 128, 134 (1956).

language of the treaty or its drafting history. Without explanation, the Memorandum represented a marked departure from the hitherto official position of the United States Government on the meaning of Article 3 as expressed at the Hague Conference in 1955.[10] Rather, the Memorandum for the United States urged that the decision of the Court below was a logical extension of *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), and *Warren* v. *The Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965).

We agree that the decision of the Court below *is* a logical extension of the rationale of *Mertens* and *Warren*. See the extended discussion in Note, *Warsaw Convention*—

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[10] At this Conference, which was convened to consider several proposed amendments to the Warsaw Convention, the United States sought and achieved an amendment to Article 3(1) to require that there be included in the passenger ticket:

> "a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, p. 2 (1956).

The sanction in Article 3(2) was also amended, again upon the basis of a proposal by the United States, to read as follows:

> "Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(*c*) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22." II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, p. 3 (1956).

The decision of the Court below has now placed the United States Government in the position of having sought and obtained wholly unnecessary amendments to Article 3 in 1955. See, I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, pp. 124, 128, 134 (1956).

Limited Liability—Notice, 33 J. AIR L. AND COM. 698 (1967).

The underlying rationale of those decisions is that the purpose of the "statement" in the passenger ticket, as to the applicability of the liability rules of the Convention,[11] is to warn the passenger about the limits of liability so that he can take self-protective measures. According to these decisions, the Convention requires delivery of the ticket[12] in order to convey this warning to the passenger. This rationale, however, finds no support in the conditions which gave rise to the making of the Warsaw Convention, the purposes sought to be achieved, the negotiations surrounding the drafting of the Convention or the understanding of the parties themselves. It is clear from this material, and from other transportation conventions adopted previously, that the inclusion of the Article 3(1)(e) statement in the passenger ticket is intended to serve as a "clause paramount". The purpose of this clause was to ensure the avoidance of international conflicts of law problems by the application of the uniform rules of the Warsaw Convention.[13]

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[11] Article 3(1)(e). 49 Stat. 3015.

[12] Article 3(2). 49 Stat. 3015.

[13] The landmark case of *The Hurry On (Vita Food Products* v. *Unus Shipping Co.*), 1939 A.M.C. 257, [1939] A.C. 277, makes clear that the purpose of this kind of clause is to resolve international conflicts of law problems. A similar provision exists in the United States Carriage of Goods by Sea Act that every bill of lading "which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, *shall contain a statement* that it shall have effect subject to provisions of this act." 46 U.S.C. § 1312 (1964) (emphasis added). See, CARVER, CARRIAGE OF GOODS BY SEA 212 (9th ed. 1952); GILMORE & BLACK, LAW OF ADMIRALTY 164 (1954); KNAUTH, OCEAN BILLS OF LADING 157 (4th ed. 1953); Selvig, *"The Paramount Clause"*, 10 AM. J. OF COMP. L. 205, 207-8 (1961).

Because of their admitted and understandable disapproval of the low limit of liability established by the Warsaw Convention, courts of the United States, as represented by the decisions in *Mertens, Warren* and the Court below, have been whittling away at this treaty to accomplish what they consider to be justifiable ends. However, these courts are acting in complete disregard of the solemn obligations undertaken by the United States in the treaty.

The United States Government has declared its intention to remain a party to the Warsaw Convention and to work for increased limits of liability within the framework of the Convention by international agreement.[14] If the Warsaw Convention is now unnecessary or undesirable for the United States, then the United States Government should withdraw in accordance with the machinery established by the treaty, and not stand aside while the treaty is slowly but effectively whittled away by erroneous court interpretation.

III.

In many instances, where reargument has taken place after an affirmance by an equally divided Court, the deadlock which existed among the original members of the Court has been broken. For example, see:

Ladner v. *United States,* 355 U.S. 282 (1958), *rehearing granted,* 356 U.S. 969 (1958). On rehearing, the judgment was reversed by a vote of 8-1. 358 U.S. 169 (1958).

Halliburton Oil Well Cementing Co. v. *Walker,* 326 U.S. 696 (1946); *rehearing granted,* 327 U.S. 812 (1946). On rehearing the judgment was reversed by a vote of 8-1. 329 U.S. 1 (1946).

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[14] DEP'T STATE PRESS RELEASE, No. 111, May 14, 1966.

Bernards v. *Johnson*, 313 U.S. 537 (1941), *rehearing granted*, 313 U.S. 597 (1941). On rehearing the judgment was affirmed by a vote of 9-0. 314 U.S. 19 (1941).

Lisenba v. *State of California*, 313 U.S. 537 (1941), *rehearing granted*, 313 U.S. 597 (1941). On rehearing the judgment was affirmed by a vote of 7-2. 314 U.S. 219 (1941).

Gray v. *Powell*, 312 U.S. 666 (1941), *rehearing granted*, 313 U.S. 596 (1941). On rehearing the judgment was reversed by a vote of 5-3. 314 U.S. 402 (1941).

United States v. *Grimaud*, 216 U.S. 615 (1910). On rehearing the judgment was reversed by a vote of 9-0. 220 U.S. 506 (1911).

The "intensive study attendant upon opinion-writing" [15] presumably enabled the Court to resolve the issues in those cases, even though the judgment in each case had been initially affirmed by an equally divided Court.

As Mr. Justice Frankfurter noted:

> "Due regard for the importance of these cases . . . and the demands of sound adjudication call for reargument. . . .
>
> "The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process" [16]

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[15] *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 (1955).

[16] *Detroit* v. *Murray Corp.*, 357 U.S. 913 (1958) (Frankfurter, J. dissenting from the denial of a petition for rehearing).

IV.

The affirmance by the even division of this Court is binding only upon the immediate parties. "[T]he lack of an agreement by a majority of the Court on the principles of law involved prevents" the judgment of the Court "from being an authoritative determination for other cases."[17]

The identical principles of law and questions involved in this case are at issue in countless cases now pending in lower state and federal courts. As a consequence of the even division of this Court, these principles remain unsettled and the questions involved unresolved. Surely, in the interest of uniform application of this treaty of the United States, these questions should be resolved by this Court.

The so-called Montreal Agreement[18] does not lessen in any degree the necessity of resolving these questions for the future. This Agreement was in no way an amendment to the Warsaw Convention. At best, the Agreement constitutes a declaration by the carrier that it will accept liability up to $75,000 per passenger. So long as the United States remains a party to the Warsaw Convention, however, the question will continue to arise as to whether the *treaty* imposes any sanction for the failure to notify the passenger of the limit of liability then applicable.

Similarly, use of the Civil Aeronautics Board required form of notice of the various limits of liability applicable under the Warsaw/Montreal scheme,[19] will not obviate the recurrence of the questions involved herein. The question

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[17] *United States* v. *Pink*, 315 U.S. 203, 216 (1941).

[18] CAB Docket 17325, Order No. E-23680, May 13, 1966. The full text of this Order is printed in the Appendix to this Petition, commencing page 11.

[19] 14 C.F.R. § 221.175.

of whether the *treaty* imposes any sanction for the failure to give notice will arise in every case where the Civil Aeronautics Board form of notice is in fact not used, or is found inadequate for one reason or another to satisfy the requirements of the *treaty*.

V.

Surely the interests of the United States require resolution of the questions involved in this case.

It is the official view of the United States Government that

> "its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention." [20]

Further, the United States Government has declared its firm intention to encourage and participate in

> "continued discussions looking to an up-to-date and permanent international agreement on the important issues dealt with in the Warsaw Convention.[21]

The United States is regarded as the leading aviation country of the world. What chance does the United States Government have of achieving these announced objectives if the Supreme Court is unable to decide the meaning of the present international commitments in the Warsaw Convention?

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[20] DEP'T STATE PRESS RELEASE No. 111, May 14, 1966, p. 1.

[21] *Id.* at 2.

We believe the result of the even division of this Court is inimical to the interests of the United States. Accordingly, we would respectfully request that, on reargument, Mr. Justice Marshall participate in the consideration and decision of this case.

VI.

The Petition for Rehearing should be granted and the case should be set down for reargument on the regular calendar before a full bench.

Respectfully submitted,

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

THOMAS J. WHALEN
Of Counsel

April, 1968

Certificate of Counsel

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

.....

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

April, 1968

APPENDIX

Order No. E-23680

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 13th day of May, 1966

Docket 17325

Agreement C.A.B. 18900

Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol

---

ORDER APPROVING AGREEMENT

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over ninety countries likewise became parties to the Convention.[1] On November

[1] The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

15, 1965, the United States Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon six months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's Economic Regulations and assigned the above designated C.A.B. number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of

destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the United States Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of

$100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States.

The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The United States Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly sections 102, 204(a), and 412 thereof:

IT IS ORDERED THAT:

1. Agreement C.A.B. 18900 is approved.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

Certificate of Service

I hereby certify that I have this ~~18th~~ 19th day of April, 1968, served the foregoing Petition for Rehearing upon respondents, the International Air Transport Association, the Air Transport Association of America, the United States, Canada, the United Kingdom of Great Britain and Northern Ireland, the Republic of Italy, Airline Passengers Association, American Trial Lawyers Association, Bates Block, and Arnold Holtzman, *amici curiae,* by depositing same in the United States mailbox at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid addressed to the respective attorneys of record as follows:

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association
25 Broadway
New York, New York 10015

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

WILLIAM A. JENNINGS,
FLOYD A. DEMANES
Counsel for Airline Passengers Association
1860 El Camino Real-Penthouse
Burlingame, California 94010

ROBERT MAC CRATE
Counsel for Canada
48 Wall Street
New York, New York 10005

EDWIN LONGCOPE
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

ALFRED C. CLAPP
Counsel for the Republic of Italy
744 Broad Street
Newark, New Jersey

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

SAMUEL LANGERMAN
WALTER H. BECKHAM, JR.
Counsel for American Trial Lawyers Association
Concord Building
66 West Flagler Street
Miami, Florida 33130

LEE S. KREINDLER
Attorney for Bates Block
99 Park Avenue
New York, New York 10016

.....

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

SUPREME COURT U. S.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF INTERNATIONAL AIR TRANSPORT ASSOCIATION, *AMICUS CURIAE*, FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR REHEARING

HAROLD L. WARNER, JR.
25 Broadway
New York, N. Y. 10004
Attorney for the International Air Transport Association

J. G. THOMKA GAZDIK
EDWIN O. BAILEY
CARL S. ROWE
PAUL G. PENNOYER, JR.
Of Counsel

April 18, 1968

IN THE

Supreme Court of the United States

October Term, 1967

No. 70

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MOTION OF INTERNATIONAL AIR TRANSPORT ASSOCIATION, *AMICUS CURIAE*, FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR REHEARING

The International Air Transport Association moves this honorable Court for leave to file the attached brief as *amicus curiae* in the above entitled case.

Consent to this filing has been given by the attorneys for Alitalia-Linee Aeree Italiane, S.p.A., petitioner. The consent of the attorney for the respondents has been requested but has not yet been granted.

The nature of the movant's interest, and its reasons for believing that this case presents issues of such inter-

national and nationwide interest that the Court should grant the petition for rehearing are contained in the brief.

Respectfully submitted,

INTERNATIONAL AIR TRANSPORT ASSOCIATION
by its attorney

HAROLD L. WARNER, JR.
25 Broadway
New York, N. Y. 10004

April 18, 1968

Certificate of Service

I hereby certify that I have this 18th day of April, 1968 served the foregoing motion for leave to file brief in support of petition for rehearing upon petitioner, respondents, the Air Transport Association of America, the United States, Canada, the United Kingrom of Great Britain and Northern Ireland, the Republic of Italy, Airline Passengers Association, American Trial Lawyers Association, Bates Block, and Arnold Holtzman, *amici curiae,* by depositing same in the United States mailbox at 25 Broadway, New York, New York 10004 with first class postage prepaid addressed to the respective attorneys of record as follows:

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
1 Rockefeller Plaza
New York, New York 10020

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, New York 10036

THE SOLICITOR GENERAL
Department of Justice
Washington, D. C. 20630

JOHN E. STEPHEN
JOSEPH F. HEALY, JR.
Attorneys for Air Transport Association of America
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036

WILLIAM A. JENNINGS
FLOYD A. DEMANES
Counsel for Airline Passengers Association
1860 El Camino Real-Penthouse
Burlingame, California 94010

ROBERT MAC CRATE
Counsel for Canada
48 Wall Street
New York, New York 10005

EDWIN LONGCOPE
Attorney for the United Kingdom of Great Britain and Northern Ireland
26 Broadway
New York, New York 10004

ALFRED C. CLAPP
Counsel for the Republic of Italy
744 Broad Street
Newark, New Jersey

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

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WALTER H. BECKHAM, JR.
Counsel for American Trial Lawyers Association
Concord Building
66 West Flagler Street
Miami, Florida 33130

LEE S. KREINDLER
Attorney for Bates Block
99 Park Avenue
New York, New York 10016

HAROLD L. WARNER, JR.
Attorney for the International Air Transport Association

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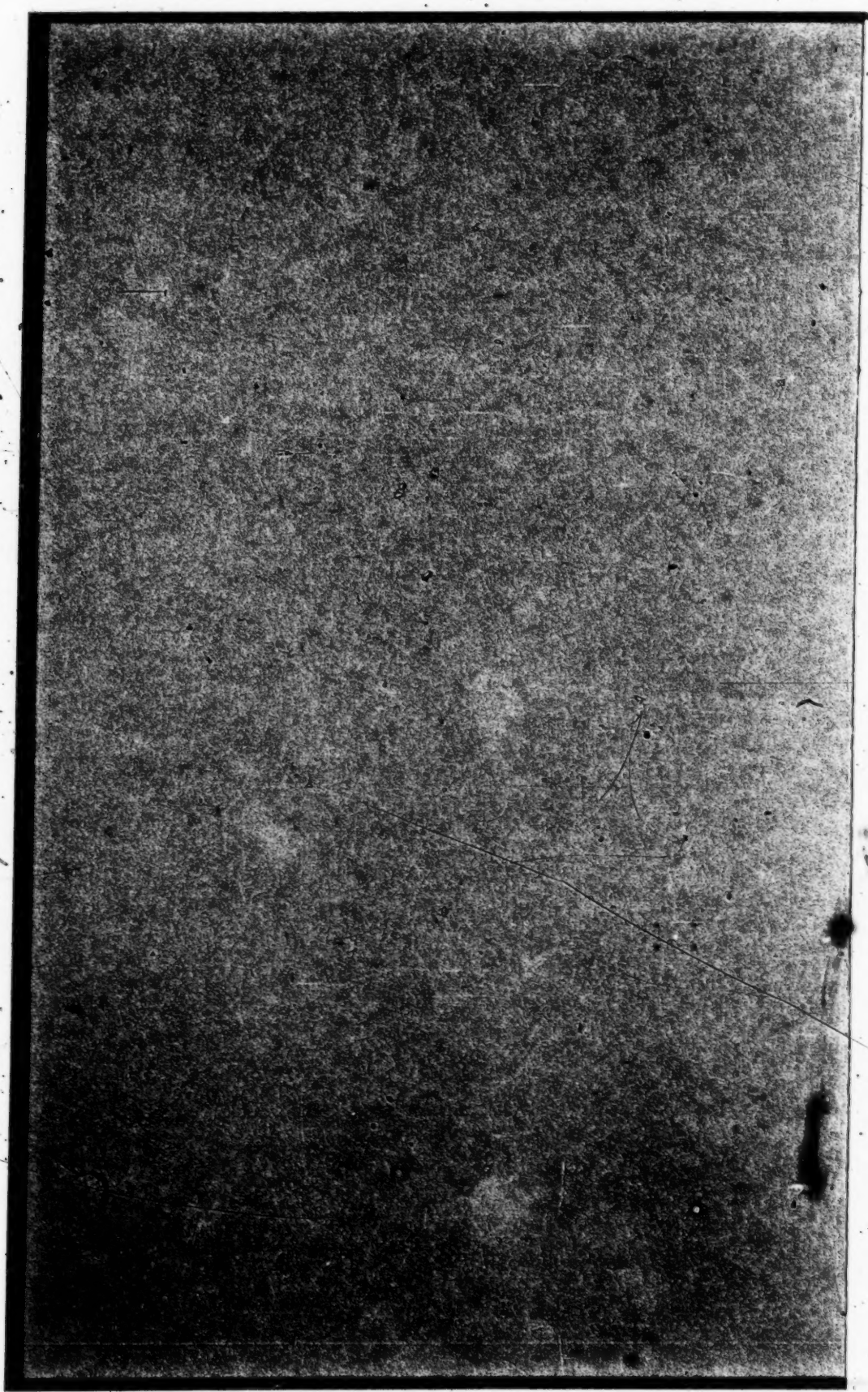
THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, N.Y. 10036



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RESPONSE IN OPPOSITION TO MOTION OF INTERNATIONAL AIR TRANSPORT ASSOCIATION, *AMICUS CURIAE*, FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR REHEARING

Preliminary Note

It is respectfully submitted that the within Motion by the International Air Transport Association (IATA) and its submission of the brief in support of Alitalia's petition for rehearing, is improper. There is no provision in the Rules of this Court for such a proceeding. The danger is that the door may be opened to a co-ordinated effort by parties having the same ultimate interest to present a multiplicity of arguments.

Without waiving their objections to this unusual procedure employed by IATA, plaintiffs-respondents interpose the following response:

At the outset it should be noted that no Memorandum or Opinion was handed down in this Court's decision. Accordingly any assumptions as to the reasoning or motivations of any member of the Court in making his decision are entirely speculative and improper. Correspondingly, IATA's post-decision challenge to its erected assumptions hardly merits serious attention.

In any event, the IATA brief is a repetition of the arguments previously made by Alitalia and its air-carrier adherents orally and in their voluminous briefs. Any claim that the matter was not fully explored exhaustively and in depth by all concerned is belied by the numerous briefs and the many preliminary motions, all of which received the Court's close attention. It is doubtful that this case could have been more fully and exhaustively covered, including as it did, briefing of the complete legislative history of the Warsaw Convention, the Warsaw Conference Minutes, and its background in relation to industry conditions, industry growth and development since its initial consideration, apart from a plethora of citations. In fact, Alitalia and its industry adherents also exhaustively briefed and discussed the Hague Protocol and its implications. All of this had been reviewed by the Court of Appeals, as well as by this Court.

In addition, the United States Government, which had been requested by this Court to state its views, filed a brief thoroughly reviewing the Convention and carefully weighing the implications of the *Lisi* decision, and as a matter of policy, wholly approving the decision without reservation. The Civil Aeronautics Board also filed a brief which

in essence supported the *Lisi* decision and the Government's brief while demolishing the inaccurate statements of the Alitalia group with respect to the Civil Aeronautics Board's attitude as to the adequacy of the Warsaw tickets. It is also undisputed that the unjust and discriminatory nature of the Convention is widely conceded.

As the United States has stated through the Solicitor General concerning the Court of Appeals *Lisi* decision: "It also represents, in our view a proper performance of the judicial duty of the courts of contracting states to implement the broad provisions of the Convention" (U.S. Brief, p. 7). The briefs of the United States Government and the Civil Aeronautics Board obviously also represent the policy of the United States Government with respect to the Warsaw Convention.

IATA again assumes the familiar "dire consequences" stance. This case has been disposed of on its own record. As to the few other Warsaw actions that may be pending, there is nothing in this record as to the number there are, or the particular facts or type of ticket involved in each case. The international ticket has been continually revised in the past and concededly will be in the future. It is proper to dispose of this case on its own merits without regard to hypothetical other cases that are not before the Court.

The inference that by the denial of certiorari in *Berguido* this Court has left a conflict in the second and third circuits is another transparently desperate effort to find a basis for rehearing. There was no decision by the third circuit in *Berguido* on the issues involved herein. The only resemblance is that both cases arose out of separate Warsaw crashes. In *Berguido* there was no ticket before the Courts below, except a segment flight coupon, nor was there

any ticket legibility issue or ticket sufficiency issue raised there, nor was there any decision by the third circuit on this point, accordingly there was no similarity of facts and issues with *Lisi*. It may be noted that the Motion of the *Berguido* petitioner before this Court to consolidate *Lisi* with *Berguido*, in an effort to identify with *Lisi* had been strenuously opposed in a brief filed by these plaintiffs-respondents on the afore-mentioned grounds. The Motion to consolidate was not granted.

In short, nothing new has been added to the familiar arguments of the Alitalia group except to again indicate their dissatisfaction with the American judicial process.

WHEREFORE, it respectfully submitted that the Motion be denied.

Respectfully submitted,

THEODORE E. WOLCOTT
Attorney for Respondents
36 West 44th Street
New York, N.Y. 10036

SUPREME COURT OF THE UNITED STATES

No. 70.—OCTOBER TERM, 1967.

Alitalia-Linee Aeree Italiane, S. p. A., Petitioner, v. John Lisi, etc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 25, 1968.]

PER CURIAM.

The judgments are affirmed by an equally divided Court.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.